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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 145

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

J. N. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1945
CERTIORARI GRANTED OCTOBER 8, 1945

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DOCKET ENTRIES.

J. N. FLOWERS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 3539.

Appearances:
For Taxpayer: J. N. Ogden, Esq.,
For Comm'r: James L. Backstrom, Esq.

1943

Dec. 1—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 1—Copy of petition served on General Counsel.

1944

Jan. 20—Answer filed by General Counsel.

Jan. 20—Request for Circuit hearing in New Orleans, filed by General Counsel.

Jan. 24—Notice issued placing proceeding on New Orleans, La., calendar. Service of answer and request made.

Feb. 12—Motion for hearing at New Orleans, La., beginning 2/21/44 filed by taxpayer. 2/14/44 Granted.

Feb. 15—Hearing set February 21, 1944 in New Orleans, La.

1944

Feb. 23—Hearing had before Judge Turner on the merits. Submitted. Ta .payer's brief due 4/8/44. Respondent's brief due 5/8/44. Taxpayer's reply brief due 5/29/44.

Apr. 5—Motion for extension of 45 days to file taxpayer's brief, filed by taxpayer.

Apr. 18—Order extending time to 5/25/44 to file petitioner's brief and also respondent's brief and 15 days to file reply briefs, entered.

Apr. 19—Transcript of hearing 2/23/44 filed.

May 6—Motion to correct transcript filed by taxpayer. 5/9/44 Granted.

May 25—Brief filed by taxpayer. 5/26/44 Copy served.

May 25—Brief filed by General Counsel. Served 5/26/44.

June 5—Reply brief filed by taxpayer. 6/5/44 Copy served.

Aug. 7—Memorandum findings of fact and opinion rendered. Judge Turner. Decision will be entered for respondent. Copy served.

Aug. 7—Decision entered. Judge Black. Div. 15.

Sept. 6—Motion to set aside and vacate decision and enter decision for petitioner filed by taxpayer. 9/11/44 Denied.

Oct. 11—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.

Oct. 11—Proof of service filed by taxpayer.

Oct. 27—Statement of evidence lodged, proof of service attached.

Oct. 27—Precipe filed by taxpayer, proof of service thereon.

Nov. 20—Revised statement of evidence lodged.

Nov. 23—Revised statement of evidence approved and ordered filed.

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PETITION.

Received Dec. 1, 1943.

Filed Dec. 1, 1943.

The Tax Court of the United States.

J. N. Flowers, Petitioner,
v. Docket No. 3539.
Commissioner of Internal Revenue, Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated September 3, 1943, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 1505 North State Street, Jackson, Mississippi. The returns for the period here involved were filed with the Collector for the State of Mississippi.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on September 3, 1943.

3. The taxes in controversy are income taxes for the calendar years 1939 and 1940 and in the amount of $591.07.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the tax liability of the petitioner for the calendar year 1939, the Commissioner erroneously disallowed a deduction of $900.00 representing traveling

expenses of petitioner (including the entire amount expended for meals and lodging) while away from home in the pursuit of his trade or business. The Commissioner contends that the expenses are not allowable expenses under Section 23(a) of the Code and that said expenses are unallowable "personal, living, or family expenses" within the meaning of Section 24(a)(1) of the Code.

(b) In determining the tax liability of the petitioner for the calendar year 1940, the Commissioner erroneously disallowed a deduction of $1,620.00 representing traveling expenses of petitioner (including the entire amount expended for meals and lodging) while away from home in the pursuit of his trade or business. The Commissioner contends that the expenses are not allowable expenses under Section 23(a) of the Code and that said expenses are unallowable "personal, living, or family expenses" within the meaning of Section 24(a)(1) of the Code.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) In 1903 petitioner moved himself and his family from Carroll County, Mississippi, his birthplace and where he was engaged in the practice of law, to Jackson, Mississippi, where he established and has ever since maintained his home and citizenship and has engaged in his profession as a lawyer continuously to and including the taxable years here in question.

(b) Since 1906 petitioner has represented the several railroad companies controlling railroad properties now a part of Gulf, Mobile and Ohio System. In 1927 petitioner was offered the position of General Solicitor with the Gulf, Mobile and Northern Railroad Company, which was the company then controlling the said properties. The principal offices of this company were located at Mobile,

Alabama, where there was maintained for petitioner an office as a general officer of the company.

(c) As a condition to his acceptance of the position of General Solicitor, petitioner was permitted to continue to live and maintain his home in Jackson, Mississippi, as well as his membership in his law firm at that place, but, however, petitioner was required to defray all expenses incident to such trips as he might make between Jackson and Mobile and all living expenses while in Mobile. Petitioner would not accept the position unless he could continue to make his home and retain his business and professional connections in Jackson, Mississippi, and it was agreeable with the railroad that he do so. Jackson is the Capital of the State and the most important point in Mississippi on the railroad employing petitioner.

(d) In 1930 petitioner was elected to the position of General Counsel of Gulf, Mobile and Northern Railroad Company and later to the position of Vice President and General Counsel of said company, which is the position he now holds with Gulf, Mobile and Ohio Railroad Company, the successor corporation. These several positions had and held by petitioner were and are from year to year subject to annual election by the Board of Directors.

(e) During the entire period from 1927 to and including the taxable years in question petitioner maintained, used and occupied an office in connection with his law firm in Jackson, Mississippi, part of the expense of which was borne by the railroad company and in which a substantial portion of the business of the railroad company was transacted and in which petitioner transacted his own personal business. During this entire period there was available to petitioner an office located in the general offices of the railroad company at Mobile and which was

entirely maintained by the railroad company and which was used by petitioner in transacting business of the railroad company when petitioner was in Mobile.

(f) The amount of time spent by petitioner in his office in Jackson, Mississippi, in his office in Mobile, Alabama, and elsewhere, and the volume of work performed at any one place by petitioner under his employment with the railroad company was, is and has always been dependent upon changing circumstances and varies from year to year. Decisions as to how and where his duties may best be performed are largely within petitioner's discretion.

(g) The entire amount of $900.00, claimed by petitioner as a deductible expense in his personal income tax return for the year 1939 and which has been disallowed by the Commissioner, represents petitioner's traveling and living expenses incident to trips between Jackson, Mississippi, and Mobile, Alabama, and while in Mobile in the pursuit of his employment by the railroad company.

(h) The entire amount of $1,620.00, claimed by petitioner as a deductible expense in his personal income tax return for the year 1940 and which has been disallowed by the Commissioner, represents petitioner's traveling and living expenses incident to trips between Jackson, Mississippi, and Mobile, Alabama, and while in Mobile in the pursuit of his employment by the railroad company.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that there is no deficiency due from the petitioner for the years 1939 and 1940.

(Sgd.) J. N. OGDEN,
(J. N. Ogden)
Counsel for Petitioner.

J. N. Ogden,
104 St. Francis Street,
Mobile, Alabama.

VERIFICATION:

State of Alabama,
County of Mobile, ss.

J. N. Flowers, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

(Sgd.) J. N. FLOWERS.
(J. N. Flowers)

Subscribed and sworn to before me this 29th day of November, 1943.

(Sgd.) EVELYN T. SPOTSWOOD,
(Seal) (Evelyn T. Spotswood)
Notary Public.

My commission expires October 7, 1946.

EXHIBIT "A".

Form 1279 SN-IT-7

Office of Internal Revenue Agent in Charge, New Orleans Division.

Treasury Department.

Internal Revenue Service,

New Orleans 12, Louisiana.

(Copy)

September 3, 1943.

Mr. J. N. Flowers,
1505 North State Street,
Jackson, Mississippi.

Sir:

You are advised that the determination of your income

tax liability for the taxable years ended December 31, 1939 and 1940 discloses a deficiency of $591.07, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days, (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, New Orleans, Louisiana, for the attention of ..... The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner.
(Sgd.) By WILLIAM E. LOGAN,
Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.

JML/lr

Statement.

Mr. J. N. Flowers,
1505 North State Street,
Jackson, Mississippi.

Tax Liability for the Taxable Years Ended December 31, 1939 and 1940.

Income Tax.

Year	Liability	Assessed	Deficiency
1939	$ 937.04	$ 831.85	$ 105.19
1940	3,261.21	2,775.33	485.88
Totals	$4,198.25	$3,607.18	$ 591.07

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated December 22, 1941; to your protest dated April 24, 1942; and to the statements made at the conferences held on November 3, 1942 and February 23, 1943.

The unsubstantiated estimated deductions of $900.00 and $1,620.00, respectively, claimed on your income tax returns for the year 1939 and 1940 on account of "expenses incident to trips to Mobile, Alabama, on business" and "expenses incident to trips to Mobile, Alabama, where main portion of services is rendered" are held to be unallowable "personal, living, or family expenses" within the meaning of section 24(a)(1) of the Internal Revenue Code and not allowable ordinary and necessary expenses under section 23(a) of the Code, as amended by section 121 of the Revenue Act of 1942.

A copy of this letter and statement has been mailed to your representative, Mr. J. N. Ogden, 104 St. Francis Street, Mobile, Alabama, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1939.

Adjustments to Net Income.

Net income as disclosed by return $14,207.66

Unallowable deductions:		
(a) Expenses disallowed	$900.00	
(b) Error in return	1.00	901.00
Net income adjusted		$15,108.66

Explanation of Adjustments.

(a) Estimated expenses incident to trips between Jackson, Mississippi, and Mobile, Alabama, have been disallowed as a deduction from gross income.

(b) This item represents the adjustment of error noted on the face of your return.

Computation of Tax.

Net income adjusted	$15,108.66
Less:	
Personal exemption	2,500.00
Balance (surtax net income)	$12,608.66
Less:	
Earned income credit	1,400.00
Net income subject to normal tax	$11,208.66
Normal tax at 4 percent on $11,208.66	$ 448.35
Surtax on $12,608.66	488.69
Correct income tax liability	$ 937.04
Income tax assessed:	
Original, account No. 20432	831.85
Deficiency of income tax	$ 105.19

Taxable Year Ended December 31, 1940.

Adjustment to Net Income.

Net income as disclosed by return	$21,596.92
Unallowable deduction:	
(a) Expenses disallowed	1,620.00
Net income adjusted	$23,216.92

Explanation of Adjustment.

(a) Estimated expenses incident to trips between Jackson, Mississippi, and Mobile, Alabama, have been disallowed as a deduction from gross income.

Computation of Tax.

Net income adjusted	$23,216.92
Less:	
Personal exemption	2,000.00
Balance (surtax net income)	$21,216.92
Less:	
Earned income credit	1,400.00
Net income subject to normal tax	$19,816.92
Normal tax at 4 percent on $19,816.92	$ 792.68
Surtax on $21,216.92	2,172.06
Total income tax	$ 2,964.74
Defense tax	296.47
Total income and defense taxes	$ 3,261.21

Income and defense taxes assessed:
Original, account No. 20382 ..... 2,775.33

Deficiency of income and defense taxes ..... $ 485.88

JML/lr

14 ANSWER.

Received Jan. 20, 1944.

Filed Jan. 20, 1944.

(Title Omitted.)

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein admits and denies as follows:

1, 2, and 3. Admits the allegations in paragraphs 1, 2, and 3 of the petition.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5—(a). Admits that in 1903 petitioner moved himself and his family from Carroll County, Mississippi, his birthplace and where he was engaged in the practice of law, to Jackson, Mississippi; denies the remaining allegations in paragraph 5—(a) of the petition.

5—(b). Admits the allegations in paragraph 5—(b) of the petition.

5—(c). Denies the allegations in paragraph 5—(c) of the petition.

5—(d). Admits that in 1930 petitioner was elected to the position of General Counsel of Gulf, Mobile and Northern Railroad Company and later to the position of Vice President and General Counsel of said company, which is the position he now holds with Gulf, Mobile and Ohio Railroad Company, the successor corporation. Denies the remaining allegations in paragraph 5—(d) of the petition.

5—(e), (f), (g), and (h). Denies the allegations in paragraphs 5—(e), (f), (g), and (h) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL, HJF
(J. P. Wenchel)
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:
JAMES L. BACKSTROM,
Division Counsel,
HOMER J. FISHER,
Special Attorney,
Bureau of Internal Revenue.

HJF:mmd. 1/4/44.

16 MEMORANDUM FINDINGS OF FACT AND OPINION.

The Tax Court of the United States.

J. N. Flowers, Petitioner,
v. Docket No. 3539.
Commissioner of Internal Revenue, Respondent.

J. N. Ogden, Esq., for the petitioner.
James L. Backstrom, Esq., for the respondent.

TURNER, Judge:

The respondent determined deficiencies in income tax against the petitioner of $105.19 and $485.88 for 1939 and 1940, respectively. The only issue presented is whether the petitioner is entitled to deductions of $900 and $1,620 taken by him in those years as traveling expenses.

Findings of Fact.

The petitioner resides at Jackson, Mississippi, and filed his 1939 and 1940 income tax returns with the Collector in that city.

The petitioner is an attorney and during the taxable years was employed by the Gulf, Mobile & Northern Railroad and its successor, the Gulf, Mobile & Ohio Railroad. He began the practice of law in Mississipi in 1896. In 1903 he moved to Jackson where he served as assistant attorney general of the State of Mississippi until 1906, when he resigned to enter a law firm in Jackson. Sometime after terminating that connection, he formed a law firm which conducted business in Jackson, and which, since 1922, has been known as Flowers, Brown & Hester.

The petitioner began representing the predecessors of the Gulf, Mobile & Ohio Railroad in 1906, and from that time until about 1918 or 1920, he "tried cases up and down

the road," practically all of them being in Mississippi. His connection from about 1918 or 1920 until 1927 was that of special counsel in Mississippi in which state was located from 80 percent to 90 percent of the company's properties. In 1927 he was elected to the position of general solicitor for the Gulf, Mobile & Northern Railroad by its board of directors. He continued to be elected to that position each year until 1930 when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when, upon completion of the merger of the properties of the Mobile & Ohio Railroad with those of the Gulf, Mobile & Northern and the formation of the Gulf, Mobile & Ohio, he was elected vice president and general counsel.

Since 1903 the petitioner and his family have resided in Jackson. They have resided on the same site since 1912, the petitioner having in 1917 and 1918, built the house in which they now reside. The principal office of the Gulf, Mobile & Ohio Railroad is in Mobile where the principal office of the Gulf, Mobile & Northern was also located. When petitioner was offered the position of general solicitor in 1927, he was not willing to accept it if his acceptance required him to move to Mobile. He had established himself in the practice of law in Jackson, had built his own home and had his personal and business connections there and did not desire to move away. Because of that situation, he requested, before accepting the position of general solicitor, that an arrangement be made whereby he could continue his residence in Jackson. As a consequence, an understanding was entered into between him and the railroad company by which he could continue to make his home in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both Mobile and Jackson This arrangement, which permitted the petitioner to determine for himself the amount of time he would spend in each of the places, continued through the taxable years

involved herein, though at times there has been some complaint about the fact that he did not spend more time in Mobile where his office as general counsel in 1939, and as vice president and general counsel in 1940, was located.

The petitioner's name has been continued in the name of his law firm but he has not participated in the conduct of its business nor shared in its income. The firm has been and continues as division counsel for the railroad company, and the members of the firm discussed with him, when he was in Jackson, any questions relating to railroad business or other matters in which they were interested. The petitioner's employment by the railroad company as general solicitor, and later as general counsel and as vice president and general counsel, did not prohibit him from accepting other legal employment. For a few years following 1927, he had a substantial amount of such employment, but afterwards it became only occasional, and during the taxable years in controversy he had none.

While the railroad company provided petitioner with an office in Mobile, it did not provide him with one in Jackson. His law firm furnished him with office space in Jackson, and he used his own office furniture and fixtures, except a typewriter and a desk for his secretary, which were furnished by the railroad company. The petioner continued to own an interest in the law firm's library, which he used. The railroad company furnished petitioner's Jackson office with telephone service, and paid the expenses, while in Jackson, of petitioner's secretary, who usually accompanied him to that city.

Before the merger, as well as afterwards, the greater portion of the railroad company's properties was located in Mississippi, and the bulk of the litigation in which the company was involved was conducted in that state. Most of the legal business of the company in Mississippi was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad, petitioner's

participation being advisory only and no different from his participation in similar business handled by local attorneys for the railroad in other areas and localities.

The following is a statement by months during the taxable years in controversy of the approximate number of days petitioner spent in Jackson, in Mobile, and elsewhere, together with the number of trips made from Jackson to Mobile, and from Mobile to Jackson:

	Days in Jackson	Days in Mobile	*Days Elsewhere	Trips from Jackson to Mobile and from Mobile to Jackson
1939				
January	20	3	8	1
February	16	2	10	2
March	11	15	5	4
April	13	..	17	..
May	14	17	..	6
June	13	2	15	1
July	15	5	11	4
August	28	3	..	2
September	21	2	7	3
October	24	7	..	6
November	13	3	14	1
December	15	7	9	3
Total	203	66	96	33
1940				
January	25	3	3	2
February	18	9	2	3
March	17	7	7	5
April	8	11	11	5
May	8	4	19	2
June	18	12	..	4
July	15	5	11	3
August	13	7	11	2

1940	Days in Jackson	Days in Mobile	*Days Elsewhere	Trips from Jackson to Mobile and from Mobile to Jackson
September	6	8	16	2
October	13	6	12	3
November	14	15	1	7
December	13	15	3	2
*Total	168	102	96	40

*The days spent elsewhere than in Jackson or Mobile represent time spent in Washington, New York, New Orleans, Baton Rouge, Memphis, and Jackson, Tennessee.

Generally speaking, the petitioner performed his principal work for the railroad company at its main office in Mobile. However, during 1939 and 1940, he devoted practically all of his time to matters relating to the merger of the properties of the Gulf, Mobile & Northern and the Mobile & Ohio, and since it was left to him where he would do his work, he spent most of his time in Jackson. In connection with the merger, one of the companies was involved in certain litigation in the Federal Court at Jackson, and petitioner participated in that litigation.

There was no direct route between Mobile and Jackson. Petitioner nearly always went through New Orleans in making the trip between the two points, and at times spent the night there. As he had a railroad pass he paid no train fare but did have to pay seat or berth fare. The railroad company paid all of petitioner's traveling expenses when he went on business trips to points other than Jackson or Mobile, but it paid none of his expenses in traveling between these two points or while he was at either of those two points.

The petitioner's salary as general counsel in 1939 was $17,000. and as vice president and general counsel in 1940 was $25,536.40.

In his income tax returns for 1939 and 1940, the petitioner deducted $900 and $1,620, respectively, as traveling expenses incurred in making trips between Jackson and Mobile, and living expenses while in Mobile. In determining the deficiencies involved herein, the respondent disallowed the deductions.

Opinion.

The only issue involved is whether, under the circumstances presented, the deductions taken by petitioner in the respective taxable years as traveling expenses between Jackson and Mobile and living expenses while in Mobile, come within the provisions of and are allowable under section 23 (a)(1) of the Internal Revenue Code, or fall within the provisions of section 24 (a)(1), and were properly disallowed by the respondent.

Section 23 (a)(1), *supra*, provides for the allowance as a deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business," while section 24 (a)(1), *supra*, provides that no deduction shall be allowed in respect of "Personal, living, or family expenses."

The position of the petitioner is that, for whatever reason that appealed to him, he was free to make his home wherever he saw fit, and he made it at Jackson; that it was necessary for part of his work to be done in Jackson and part of it in Mobile; that this required him to travel between the two places and in doing so he was traveling on business; that under these circumstances the expenditures incurred in traveling between the two cities and for meals and lodging while in Mobile constituted the kind of expenses which section 23 (a)(1), *supra*, provides shall be deductible. Since 1927 the headquarters of petitioner's employers have been at Mobile, where, during that time, they furnished petitioner with an office for the per-

formance of his duties. Having provided him with an office at headquarters, they did not furnish one elsewhere. During this period his employers did not require him to make his home in Mobile and perform all of his work at the office they furnished him, but permitted him to make his home in Jackson and do part of his work there under a special arrangement entered into at petitioner's request and under which petitioner paid his traveling expenses between the two cities and his living expenses while in each. Apparently the employers regarded such traveling expenses as personal expenses of the petitioner which properly should be borne by him since he preferred to continue making his home in Jackson and do part of his work there instead of moving to Mobile and doing all his work at the office which they were providing at their headquarters. So far as disclosed, the petitioner would have been required to bear the expenses of his own meals and lodging if he had moved to Mobile. So apparently his employers considered that since he continued to reside in Jackson, it was proper that he should pay for his meals and lodging while in both Mobile and Jackson. When petitioner traveled on business for his employers to points other than Mobile and Jackson, they paid his traveling expenses. Petitioner's intimation that his employers required him to travel between Jackson and Mobile on business for them at his own expense is refuted by his testimony to the effect that if he had been in Mobile and a matter came up in Jackson requiring him to go there after which he would have had to return to Mobile, his employers would have been charged with the expenses of the trip.

In support of his position, the petitioner relies strongly on *Coburn* v. *Commissioner*, 138 Feb. (2d) 763, and *Harry F. Schurer*, 3 T. C. 544, in which the taxpayers were allowed deductions for traveling expenses and meals and lodging while away from home. Those cases do not aid the petitioner. The facts in them were materially differ-

ent from those presented here. In each of those cases the taxpayers had for long periods of years maintained homes and resided in the cities in which they had followed their trade or business. During the taxable years involved, they accepted several short-term or temporary employments at places other than the cities in which they resided which employments required their absence from home. The total time spent away from home in each case was substantially less than a year.

The petitioner contends that since he was elected to his employment for only a year at a time, his employment is likewise to be regarded as only short-term or temporary. We think the answer to this is to be found in the fact that he had only one period of employment each year and that was for a full and continuous period of twelve months, and he makes no claim that in accepting the positions which he held with the railroad from and after 1927 he did not in fact look upon it as being continuous in character.

The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another. In such a situation, expenditures incurred by the taxpayer in traveling between the two cities is a personal expense and not deductible. *Frank H. Sullivan*, 1 B. T. A. 93; *Mort L. Bixler*, 5 B. T. A. 1181; *Jennie A. Peters*, 19 B. T. A. 901; *Walter M. Priddy*, 43 B. T. A. 18. Since, during the taxable years involved herein, the petitioner had no employment aside from that of the railroad companies, and rendered no service to his law firm or to others in Jackson entitling him to income therefrom, we must conclude that the expenditures involved in the instant proceeding represented personal or living expenses, the deduction of which is prohibited by section 24 (a)(1), *supra*.

Enter: Entered Aug. 7, 1944.

Decision will be entered for the respondent.

(Seal)

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25 DECISION.

The Tax Court of the United States, Washington.

J. N. Flowers, Petitioner,

v. Docket No. 3539.

Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered August 7, 1944, it is

Ordered and Decided: That there are deficiencies in income tax of $105.19 and $485.88 for 1939 and 1940, respectively.

Enter: Entered Aug. 7, 1944.

Signed) J. E. MURDOCK,

(Seal) Judge.

MOTION TO SET ASIDE AND VACATE DECISION AND ENTER DECISION FOR PETITIONER.

26 Received Sept. 6, 1944.

Filed Sep. 6, 1944.

Tax Tax Court of the U. S. Denied. Sep. 11, 1944.

(Signed) BOLON B. TURNER,

Judge.

(Title Omitted.)

Comes now the Petitioner by his attorney, J. N. Ogden, and moves the Court to set aside and vacate the decision

heretofore entered in this cause on August 7, 1944, and to enter a decision herein favorable to Petitioner and responsive to the prayer of his petition, assigning as reasons therefor the following:

(1) The Tax Court erred as a matter of law in that the decision heretofore entered in this cause is founded upon an erroneous construction and interpretation of Section 23 (a)(1) of the Internal Revenue Code and particularly of the word "home" as that word appears in said section, and which construction and interpretation of said statute and the word "home" appearing therein is contrary to the construction and interpretation thereof decided by the Circuit Court of Appeals for the Ninth Circuit in the case of *William R. Wallace, Jr., et ux v. Commissioner,* Nos. 10,574, 10,548, decided July 17, 1944.

Wherefore, it is prayed that this motion be granted.

Respectfully submitted,

J. N. OGDEN,

Counsel for Petitioner.

J. N. Ogden,
104 St. Francis St.,
Mobile, Alabama.

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27 ARGUMENT IN SUPPORT OF MOTION.

In deciding the case at bar against the Petitioner and in favor of the Respondent, the Court was required to and did hold, as a matter of law, that Section 23 (a)(1) of the Internal Revenue Code and the word "home", as used therein, should be construed as meaning the taxpayer's place of business, employment, or post or station at which he is employed, rather than his domicile or legal

residence, or at the place where he lives, in the ordinary and commonly accepted sense. In short, the Tax Court adhered to its previous construction of this statute and the word "home" as reflected in the following cases which it cited with approval, they being, *Frank H. Sullivan*, 1 B. T. A. 93; *Mort L. Bixler*; 5 B. T. A. 1181; *Jennie A. Peters*, 19 B. T. A. 901; *Walter M. Priddy*, 43 B. T. A. 18. Absent such a construction of the controlling statute, the facts being undisputed, the Tax Court could only have rendered a decision herein in favor of the Petitioner. That is to say, the adherence by the Tax Court to its former construction of the controlling statute furnished the sole support, as a matter of law, for the decision heretofore entered herein in favor of the Respondent.

Heretofore, and on May 7, 1943, in the cases of *William R. Wallace, Jr. v. Commissioner and Ina Claire Wallace v. Commissioner*, 3 T. C. ....., Dockets Nos. 110143, 110144 (CCH Decision 13,182 (M)) this Court had occasion to consider the identical law question presented in the case at bar and there entered a decision to the same effect as the decision entered herein. That is, the Tax Court, on the same principal authorities depended upon by it in the instant proceedings, disallowed the claim deductions of Wallace and his wife because it construed the statute to mean that the claimed deductions could not be allowed since they had not been incurred in traveling away from home, the Tax Court construing the statute to mean that "home" was the place of business, employment, or post or station at which the taxpayer was employed. The Wallaces had established their domicile and legal residence in San Francisco. The expenses in question were incurred by Mrs. Wallace, a motion picture actress, while engaged in making pictures in Hollywood. Following its construction of the statute, the Tax Court determined that the deductions were not allowable since Mrs. Wallace's home, for tax purposes, was in Hollywood where she was working

and not in San Francisco where she was domiciled and had her legal residence. On review of this case by the Circuit Court of Appeals for the Ninth Circuit, that Court held that "the decisions of the Tax Court entered May 7, 1943, being 'clear-cut mistakes of law' are, and each of such decision is, reversed." The mistake found to have been committed by the Tax Court was in the proper construction to be given what the Court of Appeals termed "an unambiguous income tax statute", and in that the Tax Court had construed the statute to mean one thing and the Court of Appeals construed it to mean the opposite. The opinion of the Court is, in part, as follows:

"We have found nothing in section 23 (a)(1) of the Internal Revenue Code or in the earlier legislation from which this code provision is derived which denotes any intent by Congress to attribute to the word 'home' as therein used any unusual or novel meaning.

"Therefore the Tax Court in its effort to differentiate between the conceded 'domicile' and 'legal residence' of both petitioners after their marriage and their 'home' at such times, has, we think, invaded the domain of Congress in construing the term 'home' as used in the statute under consideration as meaning 'the taxpayer's place of business, employment or the post or station at which he is employed.' Had Congress intended that the word 'home' should not be understood and applied in its ordinary sense but rather as meaning the locale of employment of the taxpayer, it would have used a more appropriate term to express such an intent. "A home in relation to the place of abode is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place."

"The clearly expressed purpose of Congress in enacting income tax laws is to impose tax burdens upon the *net*

income of individuals, and in ascertaining such income when Congress has used only literal terms in specifying the allowable deductions from gross income such meaning of deductions must be accepted by the Courts unless such course would lead to absurd results. We can conceive of no such results by giving to the word 'home' in the application of Section 23 (a)(1) of the Internal Revenue Code its normal and customary meaning. On the other hand, to judicially innovate a meaning of 'home' as the taxpayer's 'place of business, employment, or the post or station at which he is employed,' as the Tax Court has done, would, we think, operate to thwart the obvious purpose of Congress to tax *net* income and would in many cases tax the gross instead of the net income of individuals. The Court should function to interdict such a result."

The text of the opinion of the Circuit Court of Appeals for the Ninth Circuit in the *Wallace* case, supra, was not available to Petitioner nor, presumably, to the Tax Court prior to the entry of the decision herein on August 7, last. The *Wallace* case, supra, constitutes the first clear-cut reversal of the Tax Court by a Circuit Court of Appeals on the question involved here, though the Second Circuit in *Coburn v. Commissioner*, 138 F. (2d) 763, indicated quite clearly that had it been necessary for a decision of the case, that Court would have decided the law question just as did the Circuit Court of Appeals for the Ninth Circuit in the *Wallace* case, supra.

Since the Circuit Court of Appeals has decided the law question that controls the case at bar differently from the decision of that question by this Court, is is respectfully urged that this Court set aside and vacate its decision herein and enter a decision in conformity with and on the authority of the *Wallace* case, supra, and in favor of your Petitioner. See *H. C. Gowran, Petitioner v. Com-*

missioner of Internal Revenue, Respondent, 32 B. T. A. 820; *Iola Wise Stetson, Petitioner v. Commissioner of Internal Revenue, Respondent,* 27 B. T. A. 173. See, also, *William R. Stewart, et al., Petitioners v. Commissioner of Internal Revenue, Respondent,* 28 B. T. A. 256. Compare *Cattle Raisers' Assn. v. Fort Worth & D. C. R. Co., et al.,* 7 I. C. C. 513, 547.

Respectfully submitted,
J. N. OGDEN,
Counsel for Petitioner.

J. N. Ogden,
104 St. Francis St.,
Mobile, Alabama.

PETITION OF J. N. FLOWERS FOR REVIEW BY THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT OF A DECISION BY THE TAX COURT OF THE UNITED STATES.

32 Filed Oct. 11, 1944.

(Title Omitted.)

Comes now the Petitioner, J. N. Flowers, by his Attorney, J. N. Ogden, and files his petition for a review by the Circuit Court of Appeals for the Fifth Circuit of the decision of the Tax Court of the United States rendered on August 7, 1944 (Memorandum Opinion in Docket No. 3539), determining deficiencies in the Petitioner's federal income taxes for the calendar years 1939 and 1940 in the respective amounts of $105.19 and $485.88, and respectfully shows:

I.

The Petitioner, J. N. Flowers, is an individual and is a resident citizen of the City of Jackson, Hinds County, State of Mississippi. He filed his income tax return for the year 1939 and the year 1940 with the Collector of Internal Revenue for the State of Mississippi at Jackson, Mississippi.

II.

Nature of the Controversy.

The controversy involves the determination of Petitioner's liability for federal income taxes for the calendar years 1939 and 1940 and turns upon the proper construction and application of Section 23 (a)(1) of the Internal Revenue Code and the definition of the word "home", as used in that section of the law.

During the years 1939 and 1940 and for years prior and subsequent thereto, Petitioner resided and made his home and had a business office in the City of Jackson, Mississippi. During the same period, Petitioner was employed by a railroad company whose principal offices were in the City of Mobile, Alabama, where the said railroad company maintained and provided an office for Petitioner.

In the pursuit of his employment during the years in question, Petitioner traveled back and forth between Jackson, Mississippi, and Mobile, Alabama, staying in Mobile, Alabama, for varying lengths of time. In traveling between the two cities and while staying in Mobile, Petitioner incurred expenses incident thereto amounting to $900.00 in 1939 and $1620.00 in 1940.

In his federal income tax returns for the calendar years 1939 and 1940, Petitioner claimed as an allowable deduction under Section 23 (a)(1) of the Internal Revenue Code his traveling expenses between Jackson and Mobile and his living expenses while in Mobile incurred by him during those years.

Upon examination of the two returns, the Commissioner of Internal Revenue disallowed the claimed deductions for both years and assessed the deficiencies as hereinabove stated and on review by the Tax Court of the United States, the same deficiencies in income tax were found, ordered and decided.

III.

The Petitioner being aggrieved by the findings of fact and conclusions of law contained in the Finding of Fact and Opinion of the Tax Court, and by its decision pursuant thereto, desires a review thereof by the Circuit Court of Appeals for the Fifth Circuit.

IV.

Assignments of Error

The Petitioner assigns as error the following actions and omissions of the Tax Court:

(1) The Tax Court committed a mistake of law in assessing deficiencies in income tax against Petitioner of $105.19 and $485.88 for 1939 and 1940, respectively, by reason of having disallowed Petitioner's claimed deductions of $900.00 and $1620.00 for 1939 and 1940, respectively.

(2) The Tax Court committed a mistake of law in its construction of Section 23 (a)(1) of the Internal Revenue Code and in holding that the word "home", as used in said section, meant place of business, employment, or post or station where employed.

(a) The Tax Court committed a mistake of law in holding that the expenses herein involved fall within the provisions of Section 24 (a)(1) of the Internal Revenue Code and should, therefore, be disallowed.

(4) The Tax Court committed a mistake of law in failing and refusing to allow the expenses involved herein in that the said expenses were and are allowable under Section 23 (a)(1) of the Internal Revenue Code.

(5) The Tax Court committed a mistake of law when it denied Petitioner's timely motion to set aside and vacate its decision herein and enter a decision for Petitioner in conformity with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *William R. Wallace, Jr., et ux v. Commissioner,* .... Fed. (2d) .... (Advance Sheet ...., decided July 17, 1944).

(6) In its Opinion the Tax Court said that ".... he (Petitioner) makes no claim that in accepting the positions which he held with the railroad from and after 1927 he did not in fact look upon it as being continuous in character." This statement has no warrant in the record.

(7) In its Finding of Fact the Tax Court failed to include full and complete statements from the undisputed evidence relating to the following matters deemed by the Petitioner to be pertinent to his theory of the case, to-wit:

(a) The uncertainty of Petitioner's position with the railroad.

(b) Petitioner's reasons for continuing to make his home and maintain his business connections in Jackson, Mississippi.

(c) Petitioner's status as a lawyer; his understanding with his law firm and his connections in Jackson, Mississippi.

J. N. OGDEN,
Attorney for Petitioner.

J. N. Ogden,
104 St. Francis Street,
Mobile 5, Alabama.

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37 AFFIDAVIT.

State of Alabama,
County of Mobile, ss.

This day there personally came and appeared before me, the undersigned authority in and for the county and state aforesaid, the within named J. N. Ogden, who, after being by me first duly sworn, states on oath that he is Attorney of Record in the above named and numbered cause; that as such attorney he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

J. N. OGDEN.

Sworn to and subscribed before me this the 9 day of October, 1944.

EVELYN T. SPOTSWOOD,
(Seal) Notary Public.

My Commission expires October 7, 1946.

NOTICE OF FILING PETITION FOR REVIEW.

Filed Oct. 11, 1944.

(Title Omitted.)

To: J. P. Wenchell,
Chief Counsel,
Bureau of Internal Revenue,
Washington, D. C.

Please take notice that the Petitioner on the 11 day of October, 1944, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the Circuit Court of Appeals for the Fifth Circuit of the decision of the Tax Court heretofore rendered in the above entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you. This the 11 day of October, 1944.

Respectfully,
J. N. OGDEN,
Attorney for Petitioner.

J. N. Ogden,
104 St. Francis Street,
Mobile 5, Alabama.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this the 11 day of October, 1944.

J. P. WENCHEL, C.A.R.,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

40 REVISED STATEMENT OF EVIDENCE.

Received Nov. 20, 1944.

Lodged Nov. 20, 1944.

Filed Nov. 23, 1944.

(Title Omitted.)

The following is a narrative statement of the oral evidence adduced in the above-entitled cause. The case was heard by the Honorable Bolon B. Turner, Judge of The Tax Court of the United States, at New Orleans, Louisiana, on February 23, 1944. J. N. Ogden, Esq., appeared for the taxpayer, and James L. Backstrom, Esq., for the Commissioner of Internal Revenue.

JAMES N. FLOWERS, the petitioner herein, was called as a witness on his own behalf, and having been duly sworn, testified as follows:

Direct Examination.

I am engaged in practicing law; I first commenced practicing in Carroll County, Mississippi, the latter part of 1896 and continued there to the first of January, 1903. I then went to Jackson, Mississippi, as Assistant Attorney General; and I live now at Jackson, Mississippi. I have never engaged in any other profession or business. I was in the office as Assistant Attorney General for three years and then resigned and went into a firm in Jackson, which lasted about three years, and then I have always had a firm which was styled Flowers, Brown & Hester since about 1922. I am the Flowers of that firm. I belong to the American Bar Association, Mississippi State Bar As-

sociation, and the Hinds County Bar Association, and also pay dues to the Bar Association of the City of New York. In 1925 or 1926, I was president of the Mississippi State Bar Association, and at one time president of the Hinds County Bar Association.

At the time I moved to Jackson in 1903, my family consisted of only a wife; I have one living child. My family lived with me at Jackson through the years 1939 and 1940, which are the years in question. I have lived at 1505 North State Street since 1912. I own my home; and built my present house in 1917 and 1918. I am qualified to vote in Jackson, Mississippi; and have been ever since I have been there. I file my Federal income tax returns at Jackson, Mississippi, and my state income tax returns to the State of Mississippi; and have for all these years. I belong to a church and also to a country club in Jackson, and belonged to them in 1939 and 1940.

I pay a privilege license to practice law to the City of Jackson and the County of Hinds, Mississippi; and that was true in 1939 and 1940.

I began representing the G. M. and N. and its predecessors in 1906, when I went out of office as Assistant Attorney General. I have tried cases up and down the road for a great many years. The bulk of the properties of the G. M. and N. was practically all in Mississippi, and there was a little in Alabama; but I tried cases in Mississippi. About 1918 or 1920, a younger man took over, and then I represented them as special counsel in Mississippi, or my firm did, up until I took the position of general solicitor in 1927 of the Gulf, Mobile & Northern. Its principal office in 1927 was in Mobile, Alabama; it has always been there. The bulk of the property was in Mississippi at that time; there are a few miles in Mobile County, Alabama.

The position of general solicitor is purely a law position, and the appointment is made by the Board of Directors for a period from year to year.

(By Mr. Ogden):

"Q. Mr. Flowers, what, if any, understanding was had with respect to your maintaining your home or continuing to live in Jackson, Mississippi, upon your acceptance of this position?

A. Well, it was understood that I was to continue to live in Jackson, Mississippi, but I would have to pay my expenses incidental to filling the position from my home in Jackson.

Q. What expenses do you mean, for instance?

A. Well, those things it was understood that it would cost me something to travel to Mobile and back and to live in Mobile on the days I was there.

Q. The company did not pay those expenses?

A. No.

Q. Has the company ever paid those expenses?

A. No.

Q. When you are travelling on company business as general solicitor and ever since you have been general solicitor does the company pay your expenses when you travel other than between Mobile and Jackson, and vice versa, and while you are in Mobile?

A. Oh, yes. I should say that I was fairly well established in Jackson; I had lived there practically all the time since I had been there, offering my services as an attorney and the people I knew lived there and I had my home there, and I had gone to considerable expense to fix up that home and my personal and business connections were all there and I would not have been willing to take the position which I did take if it had required me to move to Mobile, and that was understood at the time, that I could live in Jackson; and then, besides I had my firm there and my name is still in the firm and for some years I did have other business on the side, business that did not require trials that would consume time, business that involved what you might say were questions which you could take around with you and work out; and be-

sides, I wanted to keep up my connection as far as I could, so that if I should not be re-elected the next year, I would have something to go to. I could not afford to surrender all that and sever my connections. I did not know one year whether I would be elected the next year or not."

(Witness continuing):

When I accepted this position, the company provided me with an office in Mobile. The law firm has always kept my office—not my very room—I had the same office but we were in another building. My firm has always kept an office for me and I have my own furnishings; I have an interest in the library; I have my own stationary, filing cases, desks and chairs, and bookcases; and everything.

Since I accepted the position of general solicitor in 1927, the railroad has paid nothing towards the expenses of my office in Jackson; but it provided me with the telephone service, so I could always be in touch.

(By Mr. Ogden):

"Q. Did they provide any furniture or anything for stenographic services or make a provision for your stenographer?

A. Yes; they have always provided a typewriter and desk for the use of my help when I was there, and in these years involved my secretary went with me and they paid his expenses when he was away from Mobile, in Jackson; but usually, when I was there, he was there and I spent, of course, the most of my time when in Jackson working on the railroad business."

(Witness continuing):

In 1930, I was given the title of general counsel of the G. M. and N. and of the N. O. G. N., the latter being the

line from Jackson, Mississippi, to New Orleans. On the completion of the reorganization of the Mobile and Ohio and the unification of operations of the properties of that railroad with the Gulf, Mobile and Northern, about the middle of September 1940, I was also given the further title of vice president.

Upon my election as an officer by these railroads from year to year since 1927, there never has been any doubt in my arrangement about where I would live and how my expenses between home and the general office of the company at Mobile would be handled.

It has been left to me as to how much time I would spend in Mobile—there has sometimes been complaint about it; but still, it has been left to me.

(By Mr. Ogden):

"Q. Mr. Flowers, you stated, in general, that you did employ some of your time on matters other than railroad matters? Was that true during 1939 and 1940 and generally throughout the entire period since 1927?

A. I can't say that it has been generally true. While I could not for those years now mention any particular item, for some years after I went on this job I did handle some important matters, but after I had been away so long—I mean away from the office in Jackson so much—why, those things got to be very occasional, but I did discuss matters with the firm from time to time and especially railroad matters. My firm there has, since 1927, been division counsel for the same properties, and I have, of course, on practically all occasions when I am there, I discussed matters pertaining to the railroad with them and any matters that they have that they want to talk with me about, though I might not have any pecuniary interest in the business in hand.

Q. You mean, do I understand from you, then, that your employment with the railroad did not forbid or prohibit you from spending any of your time that you could

without it being to the detriment of your employment by the railroad on matters that did not pertain to the railroad?

A. There was no condition of that kind.

Q. There was no prohibition or condition against it?

A. No prohibition, but I have not taken on anything that would interfere with my performance of my duties on the railroad job."

(Witness continuing):

My type of duty with the railroad has all to do with law; we discuss every sort of question on the railroad. I am responsible for the legal work of the railroad. We have a staff that is made up of lawyers altogether, and then we have our lawyers up and down the line, including division counsel and local counsel. I am responsible for everything that takes place in the legal department, and in no other.

Thereupon, counsel offered and there was received in evidence a schedule showing by days and months for the years 1939 and 1940 the approximate number of days spent by Mr. Flowers in Jackson, Mississippi, and in Mobile, Alabama; and the days spent other than in Jackson and Mobile and the approximate number of trips between Jackson and Mobile, being based on photostatic records of the hotel in Mobile where Mr. Flowers stayed and on copies of expense vouchers when he was not in Mobile, which schedule was marked Petitioner's Exhibit No. 1 and was agreed to as being correct by counsel for respondent. (A summary of such schedule is shown on page 5 of the memorandum findings of fact and opinion of the Tax Court entered herein.)

"Q. Now, during the approximate period of 203 days that you were in Jackson, in 1939, as disclosed by Exhibit

1, what were you doing in Jackson? What was your custom? Why did you spend such a long period of time in Jackson?

A. I think I can answer that as to both years together because the same business was going on throughout those two years, that is, the merger with the G. M. & N. properties and the M. & O. properties and I might say, it is fairly accurate to say that throughout those two years I devoted practically all of my time to that enterprise and I worked wherever it suited me best to work. It was quite a large undertaking and involved a large amount of work and in connection with it we were in the midst of quite vital litigation with another railroad involving an operation between Paducah, Kentucky and Jackson, Tennessee, a case that was in two or three Courts and I think that was on in 1939, on that case, and perhaps concluded before 1940, but the other matter was on throughout the two years; but it was left to me where I would work and I spent most of my time in Jackson, Mississippi, and I think the records will show from the vouchers that are here, that my secretary was there with me practically all the time where I did most of the work, in Jackson, Mississippi, and that was left to me where I would do my work,

Q. Mr. Flowers, was there anything unusual about the years 1939 and 1940, in so far as you said you spent a substantial part of time—the records show that you spent a substantial portion of time in Jackson, Mississippi—was that customary or was that unusual?

A. Well, the amount of time I spent in Jackson, Mississippi, as compared with Mobile was not the same in that year as it was in other years because we had on hand this matter; there was more work on hand in that time that I could do better in Jackson, Mississippi, than I could do in Mobile, just because these important matters were on, and I say again that it was left to me where I

would do my work; I could go to Mobile and do it or I could stay in Jackson and do it.

Q. In other words, when you were in Jackson during those years, you were not just at home working in the garden—if you work in a garden?

A. No.

Q. Did you keep your office there?

A. Yes.

Q. And you were tending to your duties?

A. Yes.

Q. Mr. Flowers, are you in position to give an estimate or an approximation of how much you consider it cost you to live and pay your room rent, your meals and other incidentals in Mobile, Alabama, a day? Have you had occasion to figure on that from time to time?

A. Why, yes. I did not keep an account or a record—I had continually before me and I would frequently consider when I was in the midst of the thing, how much it was costing me and this item about my expenses to Mobile has been in every income tax return since I have been on the job and every year it was inquired about, and I think I am safe in saying that every year an Examiner came to see me about it and asked for an explanation; and, in fact, I think nearly every year he came to my office to see me, some Examiner, and nobody ever questioned it until the Examiner came along who looked at my return for the year 1939. I mention that because I have had occasion to have it before me all the time and I always explained to them that it was an estimate and they would ask me for some information upon which the estimate was based and I would give them the best I had, but the expense, the travelling expense from Jackson to Mobile—there was no direct route and from Mobile back to Jackson.

Q. How did you go between those two places?

A. I would nearly always come by way of New Orleans and I had a railroad pass but I did not have a Pull-

man pass, and for various reasons I saved time so I could work on the train and there were various considerations of comfort that I had to take into account. I was accustomed to get the best accommodations that I could, whether I paid the expenses or whether I was on trips where the railroad paid the expenses. I have followed that practice in order to save doctors' bills and various things, and I usually carried books back and forth and had considerable luggage nearly always on that account and I, therefore, would always pay the Pullman costs and would get the best accommodations I could, usually, and I did not ride at night without getting a berth.

Q. Was it possible, Mr. Flowers, by train to come from Mobile to Jackson or go from Jackson to Mobile without traveling part of the way at night?

A. No.

Q. What route did you follow—that was through what points?

A. Well, coming from Jackson to Mobile through New Orleans, I had two ways to do it; one is to leave there about 3:00 o'clock in the afternoon and if I made the connection, catch a train for Mobile that night and when I did that I paid two Pullman fares—I paid one for the seat or room, usually, if I could get it, especially if the train was crowded, trying to avoid the crowds, and if I came that way I had two ways of doing it; one was to come to New Orleans and spend a night and catch a train the next morning or the next afternoon to Mobile. Another way was to sleep on the Illinois Central train leaving there at 11:00 o'clock at night, I believe it was, or 11:30, something like that, and coming to New Orleans in the expectation of making connection here. A lot of the time I could not make that connection; sometimes I could.

Q. In other words, you had two Pullman fares to purchase and one of them, in any event, would be a regular made-down berth or room, and there might be no other alternative, or a hotel room in New Orleans.

A. Yes.

Q. Can you give us an estimate of about how much, or an approximation of about how much it would cost you to make such a trip?

A. I have figured on that since this has been up and I have put down my items and it costs from $10.00 to $14.00.

Q. What would make the difference?

A. Well, it would be spending the night in New Orleans.

Q. That is the most expensive trip?

A. That is the most expensive trip and that is true also in coming back. For a while you could come over on an L. & N. train and I don't know whether I could do it at that time or not but if the train was right on time you could catch an 8:50 train out of here to Jackson, Mississippi, at night, a train that is not on now, and it was—I forget how far back it was that the schedules were so changed that that could not be done; I don't remember whether at that time it was or not, but if I did that I got a berth on the train to Jackson, Mississippi, and would get there at 12:00 or 1:00 o'clock.

Q. Then, going back, you had to have a berth?

A. Yes.

Q. Or, I take it, the alternative was to stay in New Orleans all night?

A. Yes.

Q. Mr. Flowers, have you had an occasion to undertake to give an estimate of how much it cost you to live a day in Mobile?

A. Yes, I have. I would say on an average, even with a room rate that I had at that time, or most of the time at least, of $2.75 a day for a room, I figured that my expenses that the minimum average would be around $8.00 a day.

Q. It would range from $8.00 to what?

A. A little in excess of that—I could not say exactly. In fact, the actual cost to me of being in Mobile instead

of at home was largely in excess of that but so much of it is due to just things you spend trying to be comfortable or something that you could not charge and could not count as a part of your necessary expenses, but when I say around $8.00 a day, I would say that is the minimum average, why, that is the way I live, whether I pay my own expenses or the railroad pays them.

Q. Mr. Flowers, in your 1939 return, you estimated and claimed expenses of $900.00 as traveling expenses between Mobile and Jackson and return, and your expenses while in Mobile. Can you say whether or not you considered that a reasonable estimate?

A. Why, I thought so, and I did it, of course, I did this when I was a little closer to it than I am now; I had some data that I could use, like check stubs, that would indicate where I was when I drew checks; that would not throw any light on the amount of the expenses, because you spend so much that you could not include in expenses, but I could locate my whereabouts when I had those expenses and I thought I was within the amount properly attributable to necessary living expenses.

Q. Mr. Flowers, for the year 1940, the amount claimed was $1,620.00 for the same purpose. Would you make the same statement with respect to what you thought about that amount?

A. Yes; I will say it was arrived at the same way; I just took the best information I had before me at the time I made out the return, and did my best to estimate it correctly. I could not swear that it is correct, but it was the best I could do with the data before me. I know it is possible that some years I may have over-estimated it, and other years I probably under-estimated it, but, on the average through the years, I don't think that my claim has been far wrong, and as I say again, I have done it pretty much—I don't know whether I have done it the same way every year or not—I just know that I have made my estimate the best I could from whatever data and

recollection I had before me at the time I made out my return and then, sooner or later, the thing was subjected to an examination by some Examiner who came to see me about it and they have, after they saw that I had, and heard my explanation, they accepted it.

Q. Mr. Flowers, is Jackson, Mississippi, a very important point on the railroad by whom you are employed?

A. Yes, it is the most important point, of course, in the State of Mississippi, and it is still true, even after the merger, that the larger portion of our property is in the State of Mississippi; that is where our main interest is in so far as litigation is concerned, and taxes.

Q. I believe Jackson is the Capital of the State, is it not?

A. Jackson is the capitol, and it is where the Railroad Commission sits and where the Tax Commission is and where the larger portion of our business is in the State."

(Witness continuing):

One case with Illinois Central was in the Federal Court in Jackson. There were hearings in that case in Jackson, and I participated in them—that was in 1939 and 1940. I appeared on behalf of the railroad before the Railroad Commission, but not very often; occasionally, when there is something that I considered of especial importance, or somebody else may think is of especial importance. I actually handled during the years 1939 and 1940 and prior thereto, and even now, the important matters for the railroad before the Interstate Commerce Commission. I actually did the trial work on those days.

Cross Examination.

My office as vice president and general counsel and before that as general counsel for the Gulf, Mobile and Ohio, was at Mobile, Alabama. The railroad with which

I am now connected and also with which I was connected in 1939 and 1940, is in the control of about the same persons that control the Gulf, Mobile and Northern Railroad Company during the years prior to that time. I would say that the control is in the hands of the same executives. The Board of Directors change from year to year.

My appointment as vice president and general counsel is by election each year and not by resolution of the Board of Directors.

"Q. However, in view of your long and successful and satisfactory services with these people in control of the Railroad, you do not have very much fear of not being re-elected each year, do you?

A. Well, I could not use that assumption that you do, very well. I have not always been certain whether they are satisfied with what I do— they sometimes may let you know about it, and sometimes they may not. I could not assume that. I know that it depends upon whether your personal as well as your business relations remain intact and in good shape.

Q. Well, haven't your personal and business relations been very amicable all these years with these officials?

A. Well, I should say fairly—fairly.

Q. Now, the arrangement by which you stated that you perform part of your service for the Railroad in Jackson, Mississippi, was one that the Railroad permitted you to do at your own personal request, was it not?

A. Well, I think you could put it that way; it was mentioned—it was understood that if I took the position, why, I would maintain my home in Jackson.

Q. Yes. However, since the main offices of the railroad were at Mobile, that is where you did the principal part of your work at Counsel for the railroad company, is it not?

A. Well, some years—not these two years. I have explained that in these two years—

Q. Yes, I understand, but generally speaking you do your principal work as Counsel for the Railroad in Mobile, do you not?

A. I would say yes.

Q. You spoke of being a Member of your old firm in Jackson, Mississippi, but as I understand, you did not participate in the profits of that firm in these years, 1939 and 1940, did you?

A. No, not in 1939 and 1940.

Q. Now, the legal work for the railroad company by which you are employed was done by your old firm in Jackson, was it not, that is, they were the Division Counsel?

A. Yes.

Q. What services did they perform?

A. Well, they were responsible for the business that required the services of attorneys in a certain district, say four or five counties, including Hinds; and Hinds County, of course, is the principal county, but they have other Division Counsel; they have these four to five counties for which they are responsible and my firm continued to be, I mean they continue now to be Division Counsel having jurisdiction over—I could not tell you just how many counties—but I could tell you how many, if it is important.

Q. Well, that is not important.

A. They are on a fairly substantial stipend as Division Counsel, but I have no part in that that they receive as General Counsel and I have not any part in anything else they earn, but it has been understood, that has been intact, that understanding, all these years, that if I should lose out on this position or resign or if I should give it up, why, I have preserved my business connections there; all I have to do is just to come back to my office and go on as I was before; that has been the understanding all these years, and that has been a very material consider-

ation with me. I didn't want to lose that reserve and, therefore, kept my connection and kept that understanding alive.

Q. If you made any trips in to Mississippi on business for the Railroad Company other than to Jackson, Mississippi, during these years, I assume that the Railroad Company paid your expenses, did it not?

A. Yes.

Q. The only one where they did not pay your expenses was when you went back and forth from Jackson to Mobile and while you were in Jackson?

A. Yes—not in Jackson.

Q. They did not pay any expenses in Jackson?

A. No.

Q. In the event you went to Jackson in a hearing, say, before the Federal Court, in this case the Railroad Company would not pay your expenses or any part of them while you were there?

A. I don't know that that situation ever arose, but I have the idea that if it had, if I had been in Mobile and the case was coming up in Jackson, and I had to go there for that purpose of attending that trial and coming back to Mobile, I would have charged the Railroad Company for that, because that would have been like anything else, but usually when those matters came up I was already in Jackson and did not get the privilege of charging any expenses to anybody."

Re-Direct Examination.

(By Mr. Ogden):

Since 1927 I have accepted outside employment for which I was paid fees. I have such employment right now. I am engaged in a case right now for somebody other than the railroad.

Because the record shows that I earned no fees in 1939

and 1940, it does not mean that I was not willing to earn something on the side during these years, but I did not have the opportunity. It is only certain kinds of things that I could afford to indulge in in the way of outside law business; it would be something that was largely a law matter, that I could carry around with me, and that could be done at one place as well as at another, something you could do on the train or at night, or odd moments; that is the only kind of thing I could afford to take, and I did not have many such opportunities for a few years after I went on the job of General Solicitor in 1927.

It is true that the railroad does not pay any of my expenses while I am in Jackson.

I had a complete home establishment, including my wife, during 1939 and 1940, and for years prior thereto, which was in operation in Jackson. The whole home organization was kept up and went on intact while I made trips to Mobile. The railroad paid none of those expenses whatever.

(By Mr. Ogden):

"Q. Do you consider, as a general proposition, that the expense of maintaining your home organization in Jackson was any less during, say, a week while you are in Mobile, that that made any material reduction in the amount of those expenses?

A. Well, it would possibly make some, not much; I don't think I could say. I don't know whether they cooked a little less than they did when I was there, or whether the laundry bill was not quite as large; the fixed charges were not in anywise reduced.

Q. Your tax bill wasn't any less?

A. The fixed charges, like water bills, and light bills, and gas bills; the telephone bills, of course, were increased, because they were continually calling me at Mobile, but whatever there was in the way of upkeep and service,

why, and all such things as that, they all went on just the same."

Re-Cross Examination.

(By Mr. Backstrom):

"Q. Judge, in your estimate of expenses at Mobile, you say that the hotel room was about $2.75 a day. Now, the difference between that and your estimate of $8.00 or $8.50 a day was pretty largely your meals while you were there?

A. Mr. Backstrom, if you go through the experience, as you often do, you just find if you are around a hotel you have to pay your way. If you get ice water, you have got to tip the boy; if you get a telegram, you have got to tip the boy that delivers it; if you get a letter, you have got to give a tip; if you call in the maid to bring you an extra towel, where they have overlooked it, in order to get the service, you have got to tip the boy who brings it; you have got to tip the boy who brings your laundry and the man who brings it back, and the man who takes your clothes to the presser, and the man who brings it back. I don't skimp whether I am on my own expense or the Railroad's expense—I don't skimp on things to be comfortable.

Q. Judge, do you recall what your salary was in 1939, from the Railroad?

A. No, I don't offhand; it was changed from time to time.

Mr. Backstrom:

Your Honor, we would like to stipulate in the record that Mr. Flowers' salary from the Gulf, Mobile and Ohio Railroad Company for 1939 was $17,000.00, and the compensation received for 1940 was $25,536.40. The Return shows, "Salary and Director's fees".

The Witness:
Let me see that? Yes, I believe that is correct.

The Court:
The record shows that.

Mr. Backstrom:
That is all.

The Court:
I have a couple of questions that may have been answered; and if they are, they will be in the record, but I am not sure. Did I understand you to say that during these years, while your name was in the firm there in Jackson, you did not participate in the business of the firm?

(The Witness):
A. Not in a pecuniary way, no. Of course, I participated in discussions of matters that might be on hand, but I had no pecuniary interest.

The Court:
You did not share in the profits?

The Witness:
I did not share in the profits.

The Court:
Now, one other question about the Railroad which has its offices in Mobile. Where did it run to and from?

The Witness:
Well, in the year 1939, say, it ran from Mobile, Alabama, to Jackson, Tennessee, and then there was a branch line to Dyersburg.

The Court:
That is Jackson, Tennessee, to Dyersburg, Tennessee?

The Witness:
Yes, sir; and there was a line from Union, Mississippi, which is almost due West from Meridian, Mississippi, extending to Meridian.

The Court:
That would be between Meridian and Jackson?

The Witness:
And a line from Union to Jackson—it used a line from Jackson to Meridian through Union, Union being a point on this main line that runs from Jackson, Tennessee, to Mobile, Alabama.

The Court:
In other words, while Jackson is on the Railroad, it is on a branch line from the main line?

The Witness:
I am not sure.

The Court:
All right.

The Witness:
It is just as important a line as is the continuous line from Jackson to New Orleans—and, in fact, that is perhaps the most important single section of the Railroad. This continues, it is not owned by the G. M. and N., but controlled for 99 years, the same as ownership for all practical purposes.

The Court:
It was a part of the System?

The Witness:

It was a part of the System, yes, so this line from Union, Mississippi, through Jackson runs on to New Orleans and we own large properties in New Orleans, in the way of yards.

The Court:

All right. That is all. Is there anything else?

Re-Cross Examination.

(By Mr. Backstrom):

Q. Judge, after the consolidation then with the Mobile and Ohio, the road then had one main line from Mobile to St. Louis, did it not?

A. Yes, sir; we had another line—a new line from Mobile that took place by virtue of the merger in the latter part of 1940—a new line from Mobile, Alabama, through Jackson, Tennessee, to St. Louis, and a line from Artesia, Mississippi, branching off from that to Montgomery, in the State of Alabama. Now, we have two lines since that merger from Mobile to Jackson, Tennessee—one of the old G. M. and N. and the other the old M. & O.

Mr. Backstrom:

That is all.

The Court:

All right. If there is nothing further, then you are excused.

(Witness excused.)"

The foregoing is all of the material evidence adduced at the hearing before the Tax Court, and the same is approved by the undersigned.

J. N. OGDEN,
Attorney for Petitioner on Review.

J. P. WENCHEL, C.A.R,
(J. P. Wenchel)
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing, and in order that the same may be preserved and made a part of the record, this Revised Statement of Evidence is duly approved and settled this .... day of ....., 1944.

.....
Judge, The Tax Court of the United States.

CRM/csl
11/10/44

Approved and Ordered Filed this 23rd Day of Nov., 1944.

(Sgd.) BOLON B. TURNER,
Judge.

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57 PRAECIPE FOR RECORD.

Received Oct. 27, 1944.

Filed Oct. 27, 1944.

(Title Omitted.)

To the Clerk of The Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court

of Appeals for the Fifth Circuit, with reference to petition for review heretofore filed by the Petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Tax Court of the United States.

(2) Pleadings before the Tax Court of the United States, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

(3) The findings of fact and opinion of the Tax Court of the United States.

(4) The decision of the Court.

(5) The motion to set aside and vacate the decision and enter decision for petitioner.

(6) The order denying the motion to set aside and vacate the decision and enter decision for petitioner.

(7) The petition for review, filed by the petitioner in the above cause.

(8) The statement of evidence.

(9) This Praecipe.

(Sgd.) J. N. OGDEN,
(J. N. Ogden)
Attorney for Petitioner.

J. N. Ogden,
104 St. Francis Street,
Mobile 5, Alabama.

Service of the above and foregoing is hereby admitted this 20th day of October, 1944.

J. P. WENCHEL, C.A.R.,
(J. P. Wenchel)
Chief Counsel, Bureau of Internal Revenue. Counsel for Respondent on Review.

59 CERTIFICATE.

The Tax Court of the United States, Washington.

J. N. Flowers, Petitioner,
v. Docket No. 3539.
Commissioner of Internal Revenue, Respondent.

I, B. D. GAMBLE, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 58, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 27th day of November, 1944.

B. D. GAMBLE,
(Seal) Clerk, The Tax Court of the United States.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission

Extract from the Minutes of March 7th, 1945.

No. 11242

J. N. FLOWERS

v.

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by James N. Ogden, Esq., for petitioner, and Miss Helen Goodner, Special Assistant to the Attorney General, for respondent, was submitted to the Court.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11242

J. N. FLOWERS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the Tax Court of the United States (District of Mississippi)

(March 23, 1945)

Before HUTCHESON, HOLMES, and MCCORD, Circuit Judges.

HOLMES, Circuit Judge. This appeal involves income taxes for the calendar years 1939 and 1940. The question presented is whether deductions taken by the taxpayer for traveling expenses between Jackson, Mississippi, his place of residence, and Mobile, Alabama, his principal place of employment, and living expenses while in Mobile, are allowable, under the provisions of Section 23 (a) (1) of the Internal Revenue Code, as traveling expenses while away from home in the pursuit of a trade or business. The Tax Court sustained the Commissioner's disallowance of the deductions.

The taxpayer was born in Mississippi, and has been a citizen of that state all of his life. Early in his career as a lawyer, he moved

to Jackson, and has lived there with his family since 1903. The house that constitutes his present residence is on the same plot of ground where he has lived since 1912. He built that house and, in the usual and ordinary meaning of the word, it is his home. In a broader sense, Jackson may be called his home. His church and club affiliations are there; he has been a qualified voter in Jackson since 1903; there he pays all of his taxes; there, each year since 1903, he has duly paid his license fee to practice law, the only business or profession he has ever had. Since he entered private practice, he has always been a member of a law firm in Jackson, and he is now the senior member of the firm of Flowers, Brown, and Hester, which firm he organized in 1922.

During the years 1939 and 1940, the taxpayer was general counsel and vice-president of the Gulf, Mobile & Ohio Railroad Company, and was in charge of the law business of that company. His duties were of a purely legal nature, and his principal office was in Mobile, Alabama. As an attorney, he had been connected with this company and its predecessors for many years, but had continued to reside in Jackson and to retain his law office there. This was satisfactory to the company, provided he paid his own traveling expenses to and from Mobile and his living expenses while in each of the two cities. During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two places; during 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips. In his income tax returns, he deducted his traveling expenses incurred on those trips. He received no professional income in those years except from the railroad company.

In addition to social reasons, the petitioner had a substantial business purpose in maintaining his home and law office in Jackson. It takes time to acquire a general law practice, and the good will of clients is the most valuable asset a lawyer can have. While his present position with the railroad company seems permanent, he must be elected each year; and there is inherently an element of uncertainty in such a situation. He wanted to keep his professional connections as far as he could, so that he would have a place to go and something to do if he should resign or not be reelected at any time. He could not afford to sever all connections with his clients and acquaintances of many years. He was willing to undergo the hardships of travel and to pay his own expenses, but he declined to move his home or to surrender the good will of his business.

There is no dispute in this case about the facts; the question before us is one of law; the decision turns at least upon the meaning of the word home in Section 23 (a) (1) of the Internal Revenue Code. The Tax Court held that home, as used in this sec-

tion, means the post, station, or place of business, where the taxpayer is employed; and that on these trips the petitioner was not away from home in the pursuit of a trade or calling.

We find no basis for this interpretation. There is no indication in the statute of a legislative intention to give the word an unusual or extraordinary meaning. For the court to do so would be an invasion of the legislative domain. We think the word home as used in the statute means that place where one in fact resides. Home is the fundamental idea of domicile, and yet there is a difference in the legal conception of the two words. Domicile expresses the legal relation existing between a person and the place where he has his permanent home in contemplation of law. Home denotes the principal place of abode of one who has the intention to live there permanently.

A commuter is not deemed away from home while going to and from his work in a nearby town or city; but the petitioner was not a commuter; the cheapest and most convenient means of transportation for him was by way of New Orleans, which was a long and arduous trip, where one often missed connections and had to spend the night in a hotel. If Mobile was the taxpayer's home because his principal post of duty was there, then he either had two homes or he was away from home when he as in Jackson on railroad business. If he had only one home, then with his domicile and citizenship in Mississippi, his home would be in Alabama; at his office in Mobile, he would be at home; at his domicile in Jackson on company business, he would be away from home; but in our view it is unnecessary to indulge in these speculations.

The Government contends that the principal place of employment is a question of fact in each case. Conceding as a matter of fact that the taxpayer's principal office was in Alabama, and that his principal duties were performed there, nevertheless a question of law is presented as to the statutory meaning of the word home. The undisputed facts show that petitioner's home was in Mississippi unless the statute fixes it at the place of employment. There are no facts in this record sufficient to support a finding that the petitioner's home followed his vocation to another state; there is no legal requirement to induce this conclusion; the income-tax statutes envisage a home in which the producer lives with his dependents. When at home, he is allowed to deduct sums estimated to be sufficient to provide him and his dependents with the necessaries of life. While away from home in pursuit of a trade or business, he is allowed to deduct traveling expenses, including the entire amounts expended for meals and lodging.[1]

[1] Coburn v. Commissioner, 138 F. (2) 763; Wallace v. Commissioner, 144 F. (2)

The decision of the Tax Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment

Extract from the Minutes of March 23rd, 1945.

No. 11242

J. N. FLOWERS

v.

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of J. N. Flowers for a review of a decision of The Tax Court of the United States, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decision of the said Tax Court of the United States in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said Tax Court for further proceedings not inconsistent with the opinion of the Court.

Clerk's certificate, United States of America, United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 57 to 63 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 11242, wherein J. N. Flowers is petitioner, and Commissioner of Internal Revenue is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 56 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 12th day of June, A. D. 1945.

[SEAL]

(S) OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1945

Supreme Court of the United States

No. 145, October Term, 1945

Order allowing certiorari

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON and Mr. Justice BURTON took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE 1945

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 21 1945
CHARLES ELMORE CROPLEY
CLERK

No. 145

In the Supreme Court of the United States

OCTOBER TERM, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

J. N. FLOWERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 145

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

J. N. FLOWERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above case on March 23, 1945, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 14–21) is not reported. The opinion of the Circuit Court of Appeals (R. 57–60) is reported at 148 F. 2d 163.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 23, 1945. (R. 60.) The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in holding that taxpayer's expenditures in 1939 and 1940 for meals and lodging while living at the city where he has been regularly and principally employed since 1927, and for trips between that place and another city where he chose to keep a residence and perform some of his work, were non-deductible living and personal expenses within the purview of Section 24 (a) (1) of the Internal Revenue Code, not ordinary and necessary business traveling expenses deductible under Section 23 (a) (1) (A).

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court (R. 14–19) may be summarized as follows:

Taxpayer, a lawyer, commenced the practice of law in Mississippi in 1896. In 1903 he moved to Jackson, Mississippi, where he served as assistant attorney general of the State until 1906, when he resigned to enter a law firm in Jackson. Later he formed a new law firm at Jackson which since 1922 has been known as Flowers, Brown &

Hester. (R. 14.) In 1917–1918 he built a house in Jackson, which he has since maintained for himself and his family. (R. 15.)

In 1906 taxpayer began representing the predecessors of the Gulf, Mobile & Ohio Railroad, his present employer. From then until about 1918 he tried cases for the company, mostly in Mississippi where the bulk of its properties were located; from then until 1927 he acted as special counsel for the company in Mississippi. In 1927 he was elected general solicitor and continued to be elected to that position each year until 1930, when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad company were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad. (R. 14–15.)

The principal office of the Gulf, Mobile & Ohio Railroad is in Mobile, Alabama, as was also the principal office of its predecessor. When offered the position of general solicitor in 1927, taxpayer was unwilling to accept if it required him to give up his residence in Jackson. Accordingly, an arrangement was made between him and the railroad company whereby he was permitted to determine for himself the amount of time he would spend in Jackson and Mobile, respectively, on condition that he pay his own traveling ex-

penses between the two places and his living expenses in both places. This arrangement continued through the taxable years. (R. 15–16.)

The railroad company provided an office for taxpayer in Mobile but not in Jackson. When taxpayer worked in Jackson his law firm provided him with office space, in which he had some of his own furnishings. The company also provided telephone service and a desk and typewriter for his secretary in his Jackson office and paid the secretary's expenses while in Jackson. (R. 16.) While most of the legal business of the company was conducted in Mississippi, this business was handled by local counsel, taxpayer's participation being advisory only and not different from his participation in similar business handled by local attorneys in other areas. (R. 16–17.) Taxpayer's employment did not prohibit him from accepting outside law work, but after the first few years he performed outside work only occasionally and during the taxable years performed none at all. He has not participated in the conduct of the business of the Jackson law firm whose title still includes his name, nor has he shared in its income. (R. 16.)

Since his employment by the railroad company in 1927, first as general solicitor and thereafter as general counsel and vice president, taxpayer has performed his duties principally at the main office of the company in Mobile. However, during 1939 and 1940, the taxable years, he chose

to spend most of his time in Jackson, working on matters relating to the merger. (R. 18.) During 1939 he spent 203 days in Jackson and 66 in Mobile and made 33 trips between the two cities. During 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips between the two cities. (R. 17–18.) The railroad company paid all of taxpayer's traveling expenses when he went on business trips to points other than Jackson or Mobile, but it paid none of his expenses in traveling between these two points or while he was at either of them. His salary as general counsel in 1939 was $17,000, and as vice president and general counsel in 1940 it was $25,536.40. (R. 18.)

In his income tax returns for 1939 and 1940 taxpayer deducted his expenditures for meals and lodging while in Mobile and the expense of traveling between Mobile and Jackson, in the amount of $900 for 1939 and $1,620 for 1940. The Commissioner disallowed the deductions. (R. 19.) The Tax Court sustained the Commissioner's determination (R. 22), and the Circuit Court of Appeals reversed (R. 60).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that taxpayer's living expenses at his regular and principal place of employment are deductible under Section 23 (a) (1) (A) of

the Internal Revenue Code as ordinary and necessary business traveling expenses.

(2) In holding that taxpayer's expenses in traveling between the place where he was regularly and principally employed and a place where he chose to keep a residence and perform some of his work are deductible under Section 23 (a) (1) (A) as ordinary and necessary business traveling expenses.

(3) In construing "home", for purposes of Section 23 (a) (1) (A), as denoting an abode where the taxpayer intends to live permanently, rather than his abode at the place where he is regularly or principally engaged in business.

(4) In reversing the judgment of the Tax Court.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in *Barnhill* v. *Commissioner*, and *Winborne* v. *Commissioner*, decided April 9, 1945 (1945 C. C. H., par. 9260). Those cases presented the question whether an associate justice of the Supreme Court of North Carolina who maintained a residence in the section of the State whence he came could deduct his living expenses at Raleigh, where the court regularly sat, and the cost of traveling between his Raleigh residence and his other residence, as "ordinary and necessary * * * traveling expenses (including the

entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" within the meaning of Section 23 (a) (1) (A) of the Internal Revenue Code (Appendix, *infra*). The court there affirmed the Tax Court's disallowance of the claimed deductions, holding that the business traveling expense allowance was intended to embrace only those outlays caused by the "exigencies of the business", not such as resulted from the taxpayer's choice in maintaining a residence at a distance from his business. It reached this conclusion on the basis of the language of Section 23 (*a*) (1) (A) read in conjunction with Section 24 (a) (1) (Appendix, *infra*), the long-standing applicable Treasury regulations (Appendix, *infra*), the settled administrative practice, and decisions of the Tax Court applying a like interpretation of the statute.

The instant case presents essentially the same issue. In reversing the Tax Court's disallowance of taxpayer's deductions the court below held in substance that the phrase, "while away from home" on business, as used in Section 23 (a) (1) (A) has reference to absence from an abode where the taxpayer has the "intention" of living permanently (R. 59) and where he "in fact resides" (R. 59), rather than absence on a business trip away from the place at which, as the court below stated was the case in this instance (R. 59), the taxpayer has his principal

office and place of employment. This construction of the business traveling expense provision is incompatible with that adopted by the Circuit Court of Appeals for the Fourth Circuit in the *Barnhill* and *Winborne* cases. The latter court cited the present case and expressly declined to accept its reasoning.

2. An early and authoritative resolution of the conflict is of considerable importance. The Treasury Department and the Tax Court have consistently construed the provision in Section 23 (a) (1) (A) authorizing deduction of ordinary and necessary business traveling expenses inclusive of meals and lodging, taken in conjunction with Section 24 (a) (1) prohibiting deduction of personal or living expenses, as extending relief to a taxpayer who lives in the locality where he regularly or principally works but is required temporarily to travel to other places of business.[1] Whether the

[1] The business traveling expense provision first appeared in its present form in Section 214 (a) (1) of the Revenue Act of 1921, and has been reenacted in the successive revenue acts. For illustrative administrative rulings see O. D. 905, 4 Cum. Bull. 212 (1921); O. D. 1021, 5 Cum. Bull. 174 (1921); I. T. 1264, I-1 Cum. Bull. 122 (1922); I. T. 1355, I-1 Cum. Bull. 194 (1922); I. T. 1380, I-2 Cum. Bull. 88 (1922); I. T. 3314, 1939-2 Cum. Bull. 152; G. C. M. 28672, 1943 Cum. Bull. 66. For illustrative Tax Court decisions see *Bixler* v. *Commissioner*, 5 B. T. A. 1181; *Duncan* v. *Commissioner*, 17 B. T. A. 1088, affirmed, 47 F. 2d 1082 (C. C. A. 2d); *Priddy* v. *Commissioner*, 43 B. T. A. 18, petition for review dismissed July 23, 1941 (C. C. A. 5th); *Tracy* v. *Commissioner*, 39 B. T. A. 578; *Lindsay* v. *Commissioner*, 34 B. T. A. 840; *Peters* v. *Commissioner*, 19 B. T. A. 901;

business traveling expense allowance was intended to sanction deduction of living expenses at a taxpayer's regular or principal place of business if he maintains an additional residence elsewhere, is a question which arises frequently in the collection of income taxes and affects the recovery of substantial amounts of revenue.[2] The decision below permits a taxpayer to transform his living expenses at his principal place of business into deductible travel expenses, if for reasons of his own he maintains at another point a residence which he considers his home. The advantage to taxpayers so situated and the discrimination between them and those whose only dwelling place is at their principal place of employment are obvious.

Griesemer v. *Commissioner*, 10 B. T. A. 386; *Brown* v. *Commissioner*, 13 B. T. A. 832; *Powell* v. *Commissioner*, 34 B. T. A. 655; *Schurer* v. *Commissioner*, 3 T. C. 544; *Gustafson* v. *Commissioner*, 3 T. C. 998. Where the taxpayer has a single place of employment it has sufficed to treat his "home" for tax purposes as his residence at the place of employment (e. g., *Bixler*, *Lindsay* and *Tracy* cases, *supra*); where the taxpayer conducts business at more than one place and divides his business time between them, his residence at the principal place is the statutory "home" (e. g., *Priddy*, *Brown* and *Powell* cases, *supra*); and where he leaves a permanent or regular place of business to go to another temporarily, his residence at the permanent or regular place is the statutory "home" (e. g., *Schurer* and *Gustafson* cases, *supra*. See also *Coburn* v. *Commissioner*, 138 F. 2d 763 (C. C. A. 2d), and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C. C. A. 9th)).

[2] One aspect of the problem is at present a matter of legislative consideration. See footnote 3, *infra*.

3. The court below failed, we submit, to pay the required deference to the decision of the Tax Court. The question relates to the construction of a long-standing provision of the Internal Revenue Code, containing the word "home" which has acquired a specific meaning in this context. That meaning grows out of administrative interpretation and legislative re-enactment[3] and has been shaped by the requirements of equitable tax administration. In such matters the Tax Court has "special competence" (*Dobson* v. *Commissioner*, 320 U. S. 489, 502) and its decision "is entitled to great weight" (*Trust u/w of Bingham* v. *Commissioner of Internal Revenue*, No. 932, October Term, 1944, p. 4 of slip opinion).

[3] It is worthy of note that H. R. 1627, 79th Congress, now pending, providing that for purposes of Section 23 (a) (1) (A) the "home" of a member of Congress shall be his place of residence in the State from which he is a member, would be superfluous if the decision below were correct; for a Congressman who maintained a residence in his district which he regarded as his home would be permitted to deduct his expenses while in Washington. The merits of the problem dealt with by the bill are different, however, from those affecting the taxpayer in the present case; for a member of Congress is confronted with legal and practical necessities which are absent in the case of a private individual.

The decisions bearing upon the present problem, including the present case and the *Barnhill* and *Winborne* cases in the Fourth Circuit, were recently discussed in hearings before a Subcommittee of the Committee on Appropriations of the Senate on H. R. 3109, 79th Congress, providing *inter alia* for a $2,500 tax-free annual expense allowance for members of the House of Representatives. See pp. 8–9 of the published hearings and cf. also pp. 2–7, 10–19, and 31–33.

Although judicial review of the question presented probably was not precluded, the serious nature of the decision below and of the conflict between it and the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Barnhill* and *Winborne* cases is emphasized by the reversal in this case of the Tax Court's decision.

CONCLUSION

For the foregoing reasons it is respectfully requested that this petition for a writ of certiorari be granted.

CHARLES FAHY,
Solicitor General.

JUNE 1945.

APPENDIX

Internal Revenue Code:

SEC. 23. [As amended by Sec. 121 of the Revenue Act of 1942, c. 619, 56 Stat. 798] DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(*a*) *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * * *

(26 U. S. C., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * * *

(26 U. S. C., Sec. 24.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.23 (a)-1. *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, * * *. Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see section 19.23 (a)-2, advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. * * *

SEC. 19.23 (a)-2. *Traveling expenses.*—Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

(a) If, then, an individual, whose business requires him to travel, receives a salary as full compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income.

(b) If an individual receives a salary and is also repaid his actual traveling expenses, he shall include in gross income

the amount so repaid and may deduct such expenses.

(c) If an individual receives a salary and also an allowance for meals and lodging, as, for example, a per diem allowance in lieu of subsistence, the amount of the allowance should be included in gross income and the cost of such meals and lodging may be deducted therefrom.

A payment for the use of a sample room at a hotel for the display of goods is a business expense. Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. A taxpayer claiming the benefit of the deductions referred to herein must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

Claim for the deductions referred to herein must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

Commuters' fares are not considered as business expenses and are not deductible.

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No. 145

In the Supreme Court of the United States

OCTOBER TERM, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

J. N. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 14–21) is not reported. The opinion of the Circuit Court of Appeals (R. 57–60) is reported at 148 F. 2d 163.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 23, 1945. (R. 60.) The petition for a writ of certiorari was filed on June 21, 1945, and was granted on October 8, 1945. (R. 61). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether taxpayer's living expenses in 1939 and 1940 while residing at the city where he had been regularly and principally employed since 1927, and for trips between that city and another city where he chose for personal reasons to maintain a residence and perform some of his work, were non-deductible living and personal expenses within the purview of Section 24 (a) (1) of the Internal Revenue Code, as the Tax Court held, or ordinary and necessary business traveling expenses deductible under Section 23 (a) (1) (A), as the court below held.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court (R. 14–19) may be summarized as follows:

Taxpayer, a lawyer, commenced the practice of law in Mississippi in 1896. In 1903 he moved to Jackson, Mississippi, where he served as assistant attorney general of the State until 1906, when he resigned to enter a law firm in Jackson. Later he formed a new law firm at Jackson which since 1922 has been known as Flowers, Brown & Hester. (R. 14.) In 1917–1918 he built a house in Jackson, which he has since maintained for himself and his family. (R. 15.)

In 1906 taxpayer began representing the predecessor of the Gulf, Mobile & Ohio Railroad, his present employer. From then until about 1918 he tried cases for the company, mostly in Mississippi where the bulk of its properties were located; and from 1918 until 1927 he acted as special counsel for the company in Mississippi. In 1927 he was elected general solicitor and continued to be elected to that position each year until 1930, when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad company were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad. (R. 14–15.)

The principal office of the Gulf, Mobile & Ohio Railroad is in Mobile, Alabama, as was also the principal office of its predecessor. When offered the position of general solicitor in 1927, taxpayer was unwilling to accept if it required him to give up his residence in Jackson. Accordingly, an arrangement was made between him and the railroad company whereby he was permitted to determine for himself the amount of time he would spend in Jackson and Mobile, respectively, on condition that he pay his own traveling expenses between the two places and his living expenses in both places. This arrangement continued through the taxable years. (R. 15–16.)

The railroad company provided an office for taxpayer in Mobile but not in Jackson; when taxpayer worked in Jackson his law firm provided him with office space, in which he had some of his own furnishings. The company also provided telephone service and a desk and typewriter for his secretary in his Jackson office and paid the secretary's expenses while in Jackson. (R. 16.) While most of the litigation of the company was conducted in Mississippi, this business was handled by local counsel, taxpayer's participation being advisory only and not different from his participation in similar business handled by local attorneys in other areas. (R. 16–17.) Taxpayer's employment did not prohibit him from accepting outside law work, but after the first few years he performed outside work only occasionally and during the taxable years performed none at all. He has not participated in the conduct of the business of the Jackson law firm whose title still includes his name, nor has he shared in its income. (R. 16.)

Since his employment by the railroad company in 1927, first as general solicitor and thereafter as general counsel and vice president, taxpayer has performed his duties principally at the main office of the company in Mobile. However, during 1939 and 1940, the taxable years, he chose to spend most of his time in Jackson, working on matters relating to the merger. (R. 18.) During 1939 he spent 203 days in Jackson and 66 in Mobile

and made 33 trips between the two cities. During 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips between the two cities. (R. 17–18.) The railroad company paid all of taxpayer's traveling expenses when he went on business trips to points other than Jackson or Mobile, but it paid none of his expenses in traveling between these two points or while he was at either of them. His salary as general counsel in 1939 was $17,000, and as vice president and general counsel in 1940 it was $25,536.40. (R. 18.)

In his income tax returns for 1939 and 1940 taxpayer deducted his expenditures for meals and hotel accommodations while in Mobile and the expense of traveling between Mobile and Jackson, in the amount of $900 for 1939 and $1,620 for 1940. (R. 19, 38, 42–43.) The Commissioner disallowed the deductions. (R. 19.) The Tax Court sustained the Commissioner's determination (R. 22), and the Circuit Court of Appeals reversed (R. 60).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that taxpayer's living expenses at his regular and principal place of employment are deductible under Section 23 (a) (1) (A) of the Internal Revenue Code as ordinary and necessary business traveling expenses.

(2) In holding that taxpayer's expenses in traveling between the place where he was regu-

larly and principally employed and a place where he chose to keep a residence and perform some of his work are deductible under Section 23 (a) (1) (A) as ordinary and necessary business traveling expenses.

(3) In construing "home", for purposes of Section 23 (a) (1) (A), as denoting an abode where the taxpayer in fact lives or intends to live permanently, rather than his abode at the place where he is regularly or principally engaged in business.

(4) In reversing the judgment of the Tax Court.

SUMMARY OF ARGUMENT

The business traveling expense allowance in Section 23 must be examined not only in the light of the rule that deductions are matters of legislative grace, but in conjunction with the legislative mandate in Section 24 that no deduction shall "in any case" be allowed for living or personal expenses. Taxpayer's 1939 and 1940 living expenses in Mobile—his business headquarters since 1927—and the cost of trips between that city and Jackson, where he chose to keep his living headquarters and perform some of his work, were non-deductible living and personal expenses, as the Tax Court held, not deductible business traveling expenses, as the court below held. In reversing the Tax Court, the court below proceeded on the theory that "home" as used in Section 23 is to be

accorded its usual meaning. But "home", standing by itself, has many meanings; indeed, the court below ascribed to the word two different meanings by defining it as the place where one "in fact" lives and the place where one has the "intention" of living. Even if "home" were susceptible of but one literal interpretation, the court below erred in assuming that it was bound by that meaning. Its duty was to construe the statute by considering the word in its context, not as an isolated term, and by employing other appropriate guides for ascertaining the legislative intent.

Viewed in its statutory setting, the allowance in Section 23 for business traveling expenses has a patent objective. It is designed to afford relief to a taxpayer who in pursuit of his trade is required temporarily to travel away from the locality where he is regularly practicing it. To construe "while away from home" for purposes of Section 23 as having reference to absence from an abode other than one in the locality where the taxpayer carries on his business frustrates the legislative intent, unequivocally expressed in Section 24, to prohibit any deduction for personal or living expenses. The decision below produces the incongruous result that subsistence and commuting expenses remain non-deductible living and personal expenses if the taxpayer maintains a single dwelling place in the vicinity of his place of business, but are transformed into deductible

business traveling expenses if he chooses to maintain additional living quarters, which he regards as "home", at a distant point. It imputes to Congress an intention to discriminate in favor of those taxpayers who are able to own or rent several dwelling places simultaneously, one where their work requires them to be and one or more elsewhere. Nothing in the statute or its legislative history warrants the assumption that Congress intended to place a premium on the maintenance of a taxpayer's living headquarters at a distance from his business headquarters. Even if the legislative intent were not as plain as it is, a desire for equality among taxpayers, rather than the reverse, is to be attributed to Congress.

The allowance for business traveling expenses must also be correlated with the rest of Section 23. Such expenses represent but one class of business expenses authorized as a deduction by Section 23 and, accordingly, must qualify as "ordinary and necessary expenses * * * in carrying on" the business. The maintenance of more than one dwelling place manifestly was not essential to the conduct of the taxpayer's business. Living expenses incurred in the locality of one's business headquarters and the cost of traveling to and from the office no more constitute ordinary and necessary business expenses in the case of a taxpayer who chooses to keep several dwelling places than in the case of one who has a single dwelling place. Nor may the expenses

in question be characterized as "traveling" expenses embraced by Section 23, for they were not incurred by taxpayer in the course of business trips to Mobile but by virtue of the fact that for 13 years he had been regularly and principally employed in Mobile. A construction of the business traveling expense clause which compels treatment of 13 years' continuous employment in one locality as involving business trips to that locality is unrealistic and perverts the underlying purpose of the relief provision.

Moreover, the decision below repudiates the settled administrative interpretation, which has received implied legislative approval by successive reenactment of the business traveling expense clause in the same form in which it first appeared in the Revenue Act of 1921. The long-standing applicable Treasury Regulations are consonant only with the view that "while away from home" as used in Section 23 has reference to a temporary business trip away from the taxpayer's business headquarters, not to absence from living headquarters maintained elsewhere. The established rule, embodied in the Regulations, that commuters' fares are not deductible, necessarily rests on the premise that "home" for tax purposes is in the locality of the taxpayer's business headquarters, and that traveling between home and work is not travel incurred in the pursuit of a trade or business. The administrative rulings since 1921 have likewise construed "home" as having reference to

an abode at the taxpayer's regular post of duty. What is more, the Tax Court has consistently followed the administrative interpretation. Where, as here, we are dealing with a long-standing statutory provision which has acquired a meaning shaped by administrative practice and legislative reenactment, and the Tax Court's construction is in accord, there can be little latitude on judicial review for reaching a contrary interpretation. In any event, it cannot be said that the Tax Court's construction was so irrational as to constitute reversible error.

Under the rationale of the decision below any full-time employee, governmental or private, would be permitted to deduct his living expenses at his regular post of duty simply because for reasons satisfactory to himself he maintained at a distant point a residence which he regarded as "home." The advantages to taxpayers so situated and the discrimination against those whose only dwelling place is at their post of duty are apparent. It is inconceivable that Congress intended such results.

ARGUMENT

THE COURT BELOW ERRED IN REVERSING THE TAX COURT'S DECISION THAT THE CLAIMED DEDUCTIONS REPRESENTED NON-DEDUCTIBLE LIVING AND PERSONAL EXPENSES

The taxing statute draws a distinction between personal and living expenses on the one hand,

and business expenses on the other. Under Section 24 (a) (1) of the Internal Revenue Code (Appendix, *infra*) the former are not deductible "in any case"; under Section 23 (a) (1) (A) (Appendix, *infra*) the latter are deductible if they are "ordinary and necessary." Expressly included among ordinary and necessary business expenses allowed by Section 23 are "traveling" expenses inclusive of "meals and lodging."[1] Thus, Section 23 (a) (1) (A) authorizes the deduction from gross income of—

> All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, in-

[1] The business traveling expense clause first appeared in Section 214 (a) (1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, and has reappeared in substantially the same form in all subsequent Revenue Acts. The Senate Committee Report on the Revenue Bill of 1921 states merely that "Section 214 allows substantially the same deductions in computing net income as are authorized under existing law, but adds the following provisions: (1) The deduction for business expenses is extended to include all traveling expenses incurred while away from home in the pursuit of a trade or business." S. Rep. No. 275, 67th Cong., 1st Sess., p. 14 (1939–2 Cum. Bull. (Part 2) 181, 191). See also H. Rep. No. 350, 67th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 168, 177) to the same effect.

Apparently the clause was added to dispel any doubt as to the right of taxpayers engaged in business for themselves to deduct business traveling expenses. See 61 Cong. Record, Part 5, p. 5201:

"Mr. Hawley. * * * In Section 213 [Section 214 (a) (1) of the 1921 Act] provision is made for the deduction of traveling expenses of persons traveling on business. This will affect the commercial travelers of the country, and espe-

> cluding * * * traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * *.

The above provision must of course be examined in the light of the "now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer". *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590, 593. See also *New Colonial Co.* v. *Helvering*, 292 U. S. 435; *Deputy* v. *du Pont*, 308 U. S. 488; *McDonald* v. *Commissioner*, 323 U. S. 57. This rule acquires added significance in terms of the issue here presented, for the clause within Section 23 (a) (1) (A) authorizing the deduction of business traveling expenses inclusive of "meals and lodging" must also be read in conjunction and harmonized with the legislative mandate in Section 24 (a) that—

> In computing net income no deduction shall in any case be allowed in respect of—

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cially those who are traveling on a commission basis. Heretofore they have not been allowed this deduction, while those traveling on a salary have. This is a measure of justice and will also encourage the men who wish to enter business for themselves."

Article 292 of Treasury Regulations 45, under the Revenue Act of 1918, provided that necessary traveling expenses inclusive of meals and lodging "in an amount in excess of any expenditures ordinarily required for such purposes when at home, become business instead of personal expenses."

(1) Personal, living, or family expenses; * * *

A. THE COURT BELOW ATTEMPTED TO CONSTRUE "HOME" AS USED IN SECTION 23 WITHOUT REGARD TO ITS STATUTORY SETTING

This case turns solely on the proper construction of the business traveling expense clause in Section 23. The deductions in controversy consist of taxpayer's expenditures during the taxable years 1939 and 1940 for meals and hotel accommodations while living in Mobile, where since 1927 he had been regularly and principally employed as general counsel for a railroad company, and for trips between that city and Jackson, where for personal reasons he chose to maintain additional living quarters and to perform some of his work. (R. 15–19, 38.) The Tax Court concluded that "The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another"; accordingly, it disallowed the deductions on the ground that they represented living and personal expenses within the purview of Section 24, not business traveling expenses embraced by Section 23. (R. 21.) In reversing the Tax Court, the court below accepted the facts as found by that tribunal, but refused to follow its construction of the applicable statutory provisions. (R. 58–59.) It held (R. 59) that "Conceding as a matter of fact that the taxpayer's principal of-

fice was in Alabama, and that his principal duties were performed there," as a matter of law his "home" for purposes of Section 23 was in Mississippi and the claimed deductions were business "traveling expenses * * * while away from home". The court below professed to reach this conclusion on the premise (R. 59) that "There is no indication in the statute of a legislative intention to give the word [home] an unusual or extraordinary meaning". It proceeded, however, not only to define the word "as used in the statute" but to ascribe to it two different statutory meanings (R. 59): (1) "that place where one in fact resides"; and (2) "the principal place of abode of one who has the intention to live there permanently". Since the place where one "in fact" lives does not necessarily coincide with the place where one has the "intention" of living, these two definitions by no means afford compatible criteria for determining the deductibility of business traveling expenses "while away from home". What is more, neither of these definitions of "home" represents, we submit, a tenable construction of that term as used in Section 23.

To construe "while away from home" for purposes of Section 23 as having reference to absence from "that place where one in fact resides", as did the court below in its first suggested definition of "home", is to circumvent the very point at issue. For taxpayer "in fact" lived at Mobile, his business headquarters, during the period that

the living expenses in question were incurred, just as he "in fact" lived at Jackson and elsewhere during the intervals he was away from Mobile. Indeed, any taxpayer claiming deduction for meals and lodging necessarily will "in fact" have resided where such living expenses were incurred, at least during the period they were incurred. Instead of supporting the decision below, this first suggested meaning of "home" would preclude any deduction under Section 23 for meals and lodging; by definition such expenses will always have been incurred at "home," rather than, as the statute requires, "while away from home." The critical question, to which the court below failed to address itself in defining the statutory home as the place where one "in fact resides", is whether taxpayer's home for tax purposes was the dwelling place where he resided during the periods the living expenses in question were incurred (Mobile), or some dwelling place where he resided during other periods (Jackson and elsewhere). That the court below here straddled the issue is evident from its observation (R. 59) that it was "unnecessary to indulge in * * * speculations" whether taxpayer was away from his statutory home while living in Jackson or while living in Mobile.[2]

The second definition of "home" offered by the court below, while it purports to resolve the issue,

[2] Section 23 manifestly contemplates the existence of only one "home" at any one time for tax purposes. If a statutory home could exist simultaneously at two or more places the taxpayer would always be "away" from one or another.

attempts to do so by reference solely to the word itself, torn from the statutory fabric. Obviously the word "home", standing by itself, has many meanings,[3] as the court below recognized by attributing two different so-called ordinary meanings to it. But even if "home" had only one ordinary meaning the court below would have misconceived established principles of statutory construction in assuming that it was bound by that meaning. *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543–544; *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 94; *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 126. Its duty was to ascertain the legislative intent (*Helvering* v. *Stockholms &c. Bank, supra*, pp. 93–94)—

> not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will.

B. AS USED IN SECTION 23 "HOME" HAS REFERENCE TO AN ABODE IN THE LOCALITY OF THE TAXPAYER'S BUSINESS HEADQUARTERS

1. *The relation of the business traveling expense allowance in Section 23 to Section 24 (a)*

[3] Webster's New International Dictionary (1939 ed.) lists 10 meanings of the word.

(1).—Viewed in its statutory setting, and particularly in juxtaposition to the omnibus disallowance in Section 24 (a) (1) of deductions for personal and living expenses, the allowance in Section 23 for business traveling expenses inclusive of "meals and lodging" has a patent objective. It is designed to extend relief to a taxpayer who in pursuit of his business must travel temporarily or intermittently away from the locality where he is regularly carrying on his business. Were a taxpayer's expenses for meals and lodging at the locality of his business headquarters and in commuting to and from his office deemed to be within its embrace, the legislative mandate in Section 24 would be frustrated; for obviously all taxpayers engaged in business must incur such living and personal expenses, wherever they may keep their living headquarters. The decision below produces the incongruous result that subsistence and commuting expenses remain non-deductible living and personal expenses under Section 24 if the taxpayer has his living headquarters in the locality of his business headquarters, but are transformed into deductible business traveling expenses under Section 23 if he chooses to maintain, in addition to living quarters in the neighborhood of his business, separate living quarters elsewhere which he regards as "home". It imputes to Congress an intention to discriminate against those taxpayers who have a single dwelling place in the

vicinity of their working headquarters, and in favor of those who are able to own or rent several dwelling places simultaneously, one in proximity to the place where they work and one or more elsewhere.

There is no warrant in the language of the statute or the legislative history of the business traveling expense provision—nor is any reason suggested in the opinion below—for the view that Congress intended to place a premium on the maintenance of a taxpayer's living headquarters at a distance from his business headquarters by sanctioning the deduction under these circumstances of purely living and personal expenses as business traveling expenses. It is inconceivable that Congress, having in Section 24 peremptorily denied all taxpayers the privilege "in any case" of deducting personal or living expenses, wished to place beyond the reach of this flat prohibition those taxpayers who choose to keep their living headquarters at a distance from the localities where they produce their taxable incomes. Even if the legislative intent in this respect were not as plain as it is, "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse", *Colgate* v. *United States*, 320 U. S. 422, 425. When the traveling expense provision is examined in conjunction with Section 24, the conclusion is irresistible that "while away from home" as used in

Section 23 has reference to a temporary business trip away from an abode at the locality where the taxpayer is earning his livelihood, not to absence from an abode elsewhere.

2. *The relation of the business traveling expense clause to the rest of Section 23.*—The court below erred not only in failing to correlate the allowance of business traveling expenses in Section 23 with the disallowance of personal and living expenses in Section 24, but in isolating the business traveling expense clause from the rest of Section 23 itself. For "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" represent but one kind of "ordinary and necessary expenses * * * in carrying on any trade or business" authorized as a deduction by Section 23. The word "including", which follows the general clause and precedes the clause relating to traveling expenses, imports that the draftsman intended by the traveling expense allowance to specify a particular class of expenses embraced by the general category of ordinary and necessary business expenses. Cf. *Helvering* v. *Morgan's, Inc., supra.* That this was the legislative intent is confirmed by the committee reports accompanying the Revenue Act of 1921.[4] The court below was unconcerned, however, with whether the claimed

[4] See footnote 1.

deductions qualified as "ordinary and necessary expenses * * * in carrying on" taxpayer's employment duties. Its reversal of the Tax Court's decision was predicated entirely on its view of the word "home" found in the business traveling expense clause. Had it examined the word and the clause in which it appears in the context of Section 23 as a whole (and even apart from Section 24 (a) (1)) it could not, we believe, have reached the conclusion it did.

In the first place, the claimed deductions do not even constitute "business" expenses, since they were not directly connected with the carrying on of taxpayer's employment duties. Section 29.23 (a)–1 of Treasury Regulations 103 (Appendix, *infra*). See also *Kornhauser* v. *United States*, 276 U. S. 145; *Commissioner* v. *Heininger*, 320 U. S. 467; *McDonald* v. *Commissioner*, 323 U. S. 57; *Trust u/w of Bingham* v. *Commissioner*, No. 932, October Term 1944, decided by this Court June 4, 1945, not yet reported. The maintenance of more than one dwelling place manifestly is not essential to the prosecution of a business. To treat living expenses incurred in the vicinity of taxpayer's regular place of employment and the cost of commuting to and from his office as "business" expenses, merely because he keeps additional living quarters elsewhere which he considers to be his home, would (*McDonald* v. *Commissioner*, *supra*, pp. 60–61)—

> disregard the explicit restrictions of Section 23 confining deductible expenses solely to outlays in the efforts or services * * * from which the income flows.

Such expenditures retain their character as non-deductible living and personal expenses irrespective of the number of abodes a taxpayer may choose to own or rent or which one he calls "home"; they no more represent "business" outlays in the case of a taxpayer who maintains several dwelling places than in the case of one who has a single dwelling place.

Nor does the circumstance that taxpayer desired to retain his contacts at Jackson in order to provide against the possibility that he might at some future time desire to resume his law practice there, serve to give his maintenance of a residence at Jackson a "substantial business purpose", as held by the court below. (R. 58.) None of the taxpayer's income was derived from his firm at Jackson; his sole employment during the taxable years was as an official of the railroad. (R. 16.) Since his business relationship during the taxable years was solely with the railroad, any plans for his future employment elsewhere must fall into a personal category. The statute allows business deductions in recognition of the expense involved in earning the income which is to be taxed, and that allowance must necessarily exclude expenditures of a non-existent

but merely potential business, which have no relationship to the taxable income. Taxpayer's maintenance of a residence at Jackson was no more actuated by a business purpose than was the securing of his legal education. While both might have a prospective business use, the expenses incurred had no relation to any current business activity. In any event, even if the maintenance of the Jackson residence could qualify as a business expense, no such deduction is claimed here. This case involves only the expenses incurred in traveling between Jackson and Mobile, and the expenses incurred while residing at the latter place.

Secondly, even if the claimed deductions could be regarded as "business" expenses, they could hardly be characterized as "ordinary and necessary" within the accepted meaning of those statutory terms. Increased expenditures for food, residential rent, and commutation resulting from a taxpayer's maintenance of his living headquarters at a distance from his business headquarters cannot be considered "necessary for the development of the * * * business, at least in the sense that they were appropriate and helpful" (*Welch* v. *Helvering*, 290 U. S. 111, 113); for they are no more "necessary" than are the food, rent, and commutation expenses of a taxpayer whose only living quarters are in the environs of his place of employment. Nor is there anything in the record which even remotely suggests that taxpayer's Mobile living ex-

penses were "ordinary" business expenses in the requisite sense that they were "of common or frequent occurrence in the type of business involved" (*Deputy* v. *du Pont*, 308 U. S. 488, 495).[5]

Moreover, and quite apart from the foregoing considerations, taxpayer's Mobile living expenses and the cost of trips between his Mobile and Jackson living quarters cannot, in any real sense, be regarded as business "traveling" expenses within the purview of Section 23. For they were not incurred in the course of business trips to Mobile but by virtue of the fact that for 13 consecutive years commencing in 1927 taxpayer had been em-

[5] True, taxpayer had an understanding with his employer which permitted him to decide for himself how much business time he would spend at his business headquarters in Mobile (R. 15–16), and during the taxable years chose to spend more days at Jackson than at Mobile (R. 17–18). But this arrangement was made to meet taxpayer's personal wishes and convenience, not for business reasons; indeed, taxpayer's employer acquiesced in the arrangement upon condition that taxpayer pay his own traveling expenses between Mobile and Jackson and his living expenses at both places (R. 15–16, 18), and at times complained about his failure to spend more time at his Mobile office (R. 16). And although taxpayer chose to spend more days at Jackson during the taxable years, since 1927 he had performed his duties principally at Mobile (R. 18). At any rate, it is plain from its opinion that the court below was not influenced by such factors; even if taxpayer had chosen in every year to spend all of his business time in Mobile and none in Jackson, under its conception of the statute his "home" for purposes of Section 23 would nonetheless have to be treated as his residence in Jackson, and his living expenses while working in Mobile as deductible business traveling expenses "while away from home."

ployed there as general counsel for a railroad company having its main office in that city (R. 15), where he had been performing his duties (R. 18, 21, 59). Taxpayer's presence in Mobile was required, and the living and traveling expenses in question were incurred, not because he had to travel temporarily to that city in the pursuit of a business being carried on elsewhere, but because Mobile was his regular post of duty. As the Tax Court pointed out (R. 21), taxpayer made "no claim that in accepting the positions which he held with the railroad from and after 1927 he did not in fact look upon it as being continuous in character". Insofar as his employment required him to travel from Mobile, his expenses, including "meals and lodging" at other points, might constitute deductible business "traveling" expenses.[6] But his living expenses in Mobile and the cost of trips between his Mobile and Jackson dwelling places clearly are not within that category. Taxpayer's employers did not require him to travel between Jackson and Mobile on business for them. (R. 20.) To hold, as did the court below, that 13 years' continuous employ-

[6] Taxpayer took trips during the taxable years to Washington, New York, New Orleans, Baton Rouge, Memphis and Jackson (Tenn.) (R. 18), which might fall in the category of business trips. His trips to Jackson (Miss.), with the exception of those made in order to participate in litigaton there (R. 18), were undertaken only because taxpayer chose for his own convenience to keep a residence and perform some of his duties there (R. 15–16, 18, 20).

ment at one locality must as a matter of law be treated as requiring business trips to that locality, simply because the taxpayer considers his home to be elsewhere, disregards reality and perverts the underlying purpose of the allowance for business "traveling" expenses. If the view of the court below is correct, a taxpayer may spend the major portion (or even all) of his business life at a distance from a dwelling place which he regards as his "home", and yet be entitled to deduct his living expenses at the established place of business plus the cost of traveling periodically between the two locations. An interpretation of "home" for tax purposes which compels such a result surely is not in keeping with the fundamental principle that taxation rests upon a practical and realistic base. Nor is it in keeping with the equally fundamental doctrine that deduction provisions are to be strictly construed and confined to matters unmistakably within their terms. Even if we were not here dealing with a deduction provision, "Such an intention to disregard realities so as to afford immunity from a tax is not lightly to be ascribed to the taxing authority." *Helvering* v. *Canfield*, 291 U. S. 163, 168.

Under the rationale of the holding below any permanent full-time federal employee in Washington who maintains a residence elsewhere which he regards as "home" might claim deduction of all his Washington living expenses as business

traveling expenses. By the same token, any permanent full-time state or private employee who maintains a residence at a distance from his post of duty might claim deduction of all his living expenses at his post of duty as business traveling expenses. Conversely, any such employee whose duties require him to travel temporarily to the locality where he maintains his former residence would be precluded from deducting the expenses of the trip, since he would be traveling to, rather than "away from home." Such results manifestly were not within the intent of Congress.[7]

The correct interpretation of the business traveling expense allowance is, we submit, that

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[7] It has been held (*Lindsay* v. *Commissioner*, 34 B. T. A. 840) and Congress has acted on the assumption that the Washington living expenses of its own members are not deductible under Section 23, notwithstanding that they maintain their "homes" elsewhere. One of the purposes of the provision in the Legislative Branch Appropriations Act, 1946, Public Law 85, 79th Cong., 1st Sess., for a $2,500 annual expense allowance to members of the House of Representatives was to assist the members in defraying nondeductible Washington living expenses. See Hearings before the Senate Subcommittee of the Committee on Appropriations, on H. R. 3109, 79th Congress, May 17, 1945, pp. 2–19, 30–33; 91 Cong. Rec. 4503–4532, May 10, 1945; 5109–5124, May 24, 1945; 5825–5831, June 7, 1945; Special Ruling of the Commissioner, July 20, 1945 (1945 C. C. H., Vol. 4, par. 6294). Cf. H. R. 1627, 79th Cong., 1st Sess., providing that for purposes of Section 23 the "home" of a member of Congress shall be the place of his residence in the State from which he is a member; this bill would be superfluous if the construction of "home" adopted by the court below were correct.

expounded in *Barnhill* v. *Commissioner* and *Winborne* v. *Commissioner,* 148 F. 2d 913, where the Circuit Court of Appeals for the Fourth Circuit expressly declined to follow the holding of the court below. In those cases two associate justices of the Supreme Court of North Carolina who maintained their residences and their social, religious, and political affiliations in the sections of the State from which they came and in which they had previously practiced law, sought to deduct their living expenses at Raleigh, where the court sat, and the cost of trips between Raleigh and their respective residences as business traveling expenses. In affirming the Tax Court's disallowance of the claimed deductions, the court stated *inter alia* (p. 917):

> It is clear in the first place that Congress, in prescribing the rules for the computation of net income, intended to confine the deductions for business expenses to those which are ordinary and necessary, and to prohibit the deduction of personal living or family expenses. It was recognized that the taxpayer must maintain a home for his family at his own expense even when he is absent on business, and that his personal expenses during his absence on business may fairly be regarded as expenses of the business. But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigen-

cies of the business but by the action of the taxpayer in having his home, for his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business. This is not the same as saying that the word "home" means "place of business" although in most cases where deductions for traveling expenses are claimed, the result will be the same.

3. *The settled administrative interpretation.*—If more were needed to demonstrate the error in the decision below, it is to be found in the court's repudiation of the long-settled administrative practice, which dates from the initial appearance of the business traveling expense clause in the Revenue Act of 1921. Section 19.23 (a)-2 of Treasury Regulations 103 (Appendix, *infra*), which is substantially the same as those under prior acts,[8] is consonant only with the view that "while away from home" as used in Section 23 has reference to a temporary business trip away from the taxpayer's regular post of duty. The well recognized rule, embodied in this regulation, that commuters' fares are not deductible as business

[8] Article 23 (a)-2 of Regulations 101, 94, 86; Article 122 of Regulations 77 and 74; Article 102 of Regulations 69 and 65; Article 101 (a) of Regulations 62.

traveling expenses, necessarily rests on the premise that "home" for tax purposes is at the locality of the taxpayer's business headquarters. The court below summarily disposed of the crucial question whether taxpayer was a commuter on the irrelevant ground (R. 59) that he used "the cheapest and most convenient means of transportation".

The administrative rulings, also dating from 1921, have likewise treated the statutory home as the abode at the taxpayer's regular post of duty. See, e. g., O. D. 905, 4 Cum. Bull. 212 (1921); O. D. 1021, 5 Cum. Bull. 174 (1921); Mim. 2688, 4 Cum. Bull. 209 (1921); I. T. 1264, I–1 Cum. Bull. 122 (1922); I. T. 1355, I–1 Cum. Bull. 194 (1922); I. T. 1380, I–2 Cum. Bull. 88 (1922); I. T. 1404, I–2 Cum. Bull. 145 (1922); G. C. M. 4956, VII–2 Cum. Bull. 128 (1928); I. T. 3314, 1939–2 Cum. Bull. 152; G. C. M. 23672, 1943 Cum. Bull. 66.

Since the business traveling expense provision has been reenacted in the successive Revenue Acts,[9] the Treasury's interpretation must be deemed to have received implied legislative approval. *Helvering* v. *Winmill*, 305 U. S. 79; *Taft* v. *Commissioner*, 304 U. S. 351; *Brewster* v. *Gage*, 280 U. S. 327.

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[9] Section 214 (a) (1) of the Revenue Acts of 1924 and 1926; Section 23 (a) of the Revenue Acts of 1928, 1932, 1934, 1936, and 1938.

The Tax Court has consistently followed the administrative interpretation in a wide variety of factual situations. See, e. g., *Bixler* v. *Commissioner*, 5 B. T. A. 1181; *Duncan* v. *Commissioner*, 17 B. T. A. 1088, affirmed, 47 F. 2d 1082 (C. C. A. 2d); *Priddy* v. *Commisioner*, 43 B. T. A. 18, petition for review dismissed July 23, 1941 (C. C. A. 5th); *Tracy* v. *Commissioner*, 39 B. T. A. 578; *Lindsay* v. *Commissioner*, 34 B. T. A. 840; *Peters* v. *Commissioner*, 19 B. T. A. 901; *Griesemer* v. *Commissioner*, 10 B. T. A. 386; *Brown* v. *Commissioner*, 13 B. T. A. 832; *Powell* v. *Commissioner*, 34 B. T. A. 655; *Schurer* v. *Commissioner*, 3 T. C. 544; *Gustafson* v. *Commissioner*, 3 T. C. 998. Where the taxpayer has been stationed for an indefinite period in one locality it has sufficed to treat his home for tax purposes as his residence at the post of duty (e. g., *Bixler* v. *Commissioner, supra; Lindsay* v. *Commissioner, supra; Tracy* v. *Commissioner, supra*); where he leaves a regular or permanent post to go to another temporarily his residence at the regular place remains his statutory home (e. g., *Schurer* v. *Commissioner, supra; Gustafson* v. *Commissioner, supra*); and where he divides his business time between two or more places his residence at the principal place is the statutory home (e. g. *Priddy* v. *Commissioner, supra; Brown* v. *Commissioner, supra; Powell* v. *Commissioner, supra*). Significantly, in none of these decisions is there any intimation that

"home" as used in Section 23 is synonymous with a residence—legal, actual, or intended—at a point other than where the taxpayer is regularly or principally engaged in business.

Where as here the statutory provision under scrutiny is one of long standing which has acquired a meaning shaped by administrative practice and legislative reenactment, and the Tax Court in a long line of decisions has adhered to that meaning, there can be little latitude on judicial review for reaching a contrary view. In extracting the single word "home" from its context and defining it for tax purposes as the place where one "in fact" lives or has the "intention" of living, the court below was heedless to the admonition of this Court (*United States* v. *American Trucking Ass'ns, supra,* p. 544) that—

> Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'

In any event, it cannot be said that the Tax Court's interpretation, in conformity with the established administrative policy, is so irrational or so unfaithful to the legislative intent as to constitute reversible error. *Dobson* v. *Commis-*

sioner, 320 U. S. 489, rehearing denied, 321 U. S. 231; *Trust u/w of Bingham* v. *Commissioner*, *supra*.

Coburn v. *Commissioner*, 138 F. 2d 763 (C. C. A. 2d), upon which the court below relied (R. 59, fn. 1), does not warrant reversal of the Tax Court's decision in this case. It dealt with a taxpayer who left his regular place of business to perform temporary engagements elsewhere, and it did not reject the Tax Court's construction of the statute. It was properly distinguished in the *Barnhill* and *Winborne* cases, *supra*, which involved essentially the same issue as is here presented. See also *Ellis* v. *Burnet*, 50 F. 2d 343 (App. D. C.). To the extent that the opinion in *Wallace* v. *Commissioner*, 144 F. 2d 407 (C. C. A. 9th), may be read as construing "away from home" as equivalent to absence from a residence other than the one at the taxpayer's business headquarters, it suggests, for the reasons expressed in the *Barnhill* and *Winborne* cases, an erroneous construction of the business traveling expense clause.

Whatever may be the difficulties in a particular case of determining the permanent or regular place of business of a taxpayer who is employed successively at different locations, or the principal place of business of a taxpayer who carries on business at two or more places simultaneously and divides his business time between them—a matter of fact-finding within the province of the Tax

Court—we are not here confronted with any dispute as to the essential facts. The testimony is clear (R. 34, 36–39, 44–46), the Tax Court found (R. 18, 21), and the court below accepted as the fact (R. 58–59), that since 1927 taxpayer had been regularly employed at Mobile and had performed his principal duties there.

We submit that the only reasonable construction of the business traveling expense provision is the one which the Treasury and the Tax Court have applied since that provision first appeared in the Revenue Act of 1921, and which the Circuit Court of Appeals for the Fourth Circuit sustained in the *Barnhill* and *Winborne* cases. That provision is not concerned with the number of dwelling places the taxpayer chooses to own or rent or with which one he labels "home", but is aimed at affording relief to a taxpayer who in pursuit of his vocation is required by the exigencies of his business temporarily to travel away from the locality where he is regularly practicing it. This is the only construction reconcilable with the legislative proscription in Section 24 of any deduction for personal or living expenses, with the whole of Section 23 of which the business traveling expense provision is a part, and with the doctrine that deduction provisions must be strictly construed; moreover, it is the only common sense construction susceptible of practical application to varying factual patterns. The

Court below has attributed to the word "home", which has many connotations, a meaning unrelated to its statutory setting and discordant with the settled administrative interpretation. Under its holding living expenses at a taxpayer's established business headquarters become deductible business expenses merely because for reasons satisfactory to himself he maintains his living headquarters elsewhere. The advantages to taxpayers so situated, and the discrimination against those whose only dwelling places are in the neighborhood of their businesses, are apparent. If permitted to stand, the decision below would open the door wide, particularly in these times of widespread changes of employment location, to many types of claims for deduction of living and personal expenses in the guise of business traveling expenses.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code:

SEC. 23 [as amended by Sec. 121 of the Revenue Act of 1942, c. 619, 56 Stat. 789.]. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(26 U. S. C., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

(26 U. S. C., Sec. 24.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.23 (a)–1. *Business expenses.*— Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, * * *. Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see section 19.23 (a)–2, advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. * * *
>
> SEC. 19.23 (a)–2. *Traveling expenses.*— Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.
>
> (a) If, then, an individual, whose business requires him to travel, receives a salary as full compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income.

(b) If an individual receives a salary and is also repaid his actual traveling expenses, he shall include in gross income the amount so repaid and may deduct such expenses.

(c) If an individual receives a salary and also an allowance for meals and lodging, as, for example, a per diem allowance in lieu of subsistence, the amount of the allowance should be included in gross income and the cost of such meals and lodging may be deducted therefrom.

A payment for the use of a sample room at a hotel for the display of goods is a business expense. Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may de deducted. A taxpayer claiming the benefit of the deductions referred to herein must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

Claim for the deductions referred to herein must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

Commuters' fares are not considered as business expenses and are not deductible.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 145

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

J. N. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

JAMES N. OGDEN,
Counsel for Respondent.

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IN THE

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OCTOBER TERM, 1945

No. 145

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

J. N. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

Question Presented

Whether taxpayer's expenses incurred in 1939-1940 on business trips away from his established home were deductible expenses under Section 23(a)(1) of the Revenue Act of 1938.

The answer to this question depends upon the meaning of the word "home" as used in that statute. Respondent contends, and the Circuit Court of Appeals so held, that

the word was used with its commonly accepted meaning; the Petitioner contends that the word is to be given a special and unusual meaning.

The statement of the question appearing at page 2 of the brief for Petitioner is not correct. The taxpayer did not at any time reside in Mobile, where his employer was domiciled nor was any claim made as for expenses incident to trips from the city of Mobile to the city where he had his established residence.

Statement

Respondent throughout the year 1939 and 1940 had his home in Jackson, Mississippi, where he had lived with his family continuously since January 1, 1903 (R. 33). He had lived with his family on the same lot at 1505 North State Street since 1912, on which lot he had built his present house in 1917 and 1918 (R. 34). He was, in the years 1939 and 1940 and had for some thirty-five years been, a voter in Jackson; filed his federal income tax returns there; paid his state income taxes to the State of Mississippi; belonged to a church and a country club in that city; paid his privilege license to practice law to the City of Jackson and to the County of Hinds, in which said city is located (R. 34). In the said years, and ever since the first of January, 1906, he had maintained a law office in the city of Jackson and was a member of a law firm in that city (R. 36). He accepted the position of General Solicitor of a railroad company in 1927, with the understanding that he would continue to maintain his residence in Jackson (R. 35). He testified that he was "fairly well established in Jackson . . . the people I knew lived there and I had my home there and I had gone to considerable expense to fix up that home and my personal and business connections were all there and I would not have been willing to take the position which

I did take it had required me to move to Mobile * * * and besides I had my firm there * * * and besides, I wanted to keep up my connection as far as I could, so that if I should not be re-elected the next year I would have something to go to * * * I did not know one year whether I would be elected the next year or not" (R. 35-36). It was understood that Respondent in the performance of his duties as General Solicitor would decide for himself how often he should go to Mobile and that he would have to pay the expenses incident to his trips to Mobile (R. 35). There was no understanding with respect to expenses at home (as stated at page 3 of the brief for petitioner). Counsel for Respondent refer to findings of fact of the Tax Court (R. 15). But there is no evidence to support the statement that there was an understanding with his employer that Respondent's home expenses would have to be paid by him. Of course his employer was not concerned with his home expenses. In 1939 Respondent made thirty-three trips to Mobile, averaging two days per trip in Mobile, and in 1940 he made forty trips averaging about two and a half days each. Throughout the years Respondent had his complete home establishment in Jackson, the home organization being kept intact while he made his trips to Mobile on the business of the railroad company, and as far as taxpayer could estimate there was no reduction in his home expenses occasioned by his absence (R. 48). The deduction of his expenses incident to trips to Mobile was allowed the taxpayer for the years prior to 1939, though an explanation of the item was required by the examiners each year (R. 40).

This statement is made to supplement and in some instances to correct the Statement of Facts made in brief for Petitioner, beginning at page 2 thereof.

Summary of Argument

There is no dispute as to the facts. The taxpayer was the only witness examined and what he said was accepted by the Tax Court and by the Circuit Court of Appeals. In every sense of the word the Respondent had his established "home" in Jackson, Mississippi. He had lived on the same lot for twenty-seven years. There he maintained his family, with the usual home organization. He did not locate his home with reference to his job with the Railroad; his home was already established and he accepted the position with the Railroad with the understanding that he might remain where he was and would not be required to change his residence and move his family to Mobile. These admitted facts create the occasion to define the word "home" as used in Section 23(a)(1) of the Revenue Act of 1938. The Respondent contends that the word was used with its universally accepted meaning; that there is nothing in the statute to indicate that any other meaning was intended; that the early cases, beginning with the *Bixler* case (in 1927), were not fully considered, were decided wrong; that the error made in the earlier cases has been to an extent mitigated by later decisions of the Board of Tax Appeals and by the Tax Court; that the Courts of Appeals of the Second, Fifth, and Ninth Circuits have corrected the mistake first made by the Board of Tax Appeals. The Respondent will insist that the Congress did not intend in any of its acts to impose an income tax upon other than net income; that it is the policy of the statutes to allow the expenses of earning income to be deducted from the gross in computing the amount upon which the tax is laid; that the Congress does not concern itself with the citizen's selection of a place to set up his home and maintain his family; does not intend to discourage or embarrass the preservation of the home establishment; does not require

that homes be broken up or moved in order that the citizen may produce for the government more revenue.

Further it will be contended that the authors of the statute used a word with which they were entirely familiar; that in instances where the Congress intended to have allowable expenses measured from some particular place or location such place or location was described.

ARGUMENT

I

The Word "Home" in Section 23(a)(1) of the Revenue Act of 1938 Should Be Understood and Applied in Its Ordinary Sense and Should not Be Construed as Meaning the Taxpayer's Place of Business, Employment, or the Post or Station at Which He Is Employed.

The full text of Section 23(a)(1) as it appears in the Revenue Act of 1938 is set forth below. This section of the law permits the taxpayer to deduct from his gross in-

---

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) EXPENSES:

(1) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

---

come "traveling expenses (including the entire amount expended for meals a l lodging) while away from home

in the pursuit of a trade or business" in arriving at his net income to which the tax rates are applied.

Here it is admitted that the expenses the Respondent claimed the right to deduct, and the deduction of which was allowed him by the Circuit Court of Appeals, were traveling expenses including expenses for meals and lodging while he was in the pursuit of the trade or business in which he was engaged. There is no dispute as to the points between which the traveling occurred and the place at which the expenses for meals and lodging arose. All of the traveling was between Jackson, Mississippi, and Mobile, Alabama, and all of the expense for meals and lodging was at Mobile, Alabama, or enroute between Jackson and Mobile.

The question is, Which of the two places, Mobile or Jackson, was the Respondent's "home" within the meaning of Section 23(a)(1)? This question, however, cannot be answered until there is first answered the question, What does the word "home" in Section 23(a)(1) mean? It is the answer to this last question to which we will devote this subdivision of our brief.

a. THE DEFINITION GIVEN THE WORD "HOME" BY THE PETITIONER AND THE TAX COURT IS WITHOUT SUPPORT. THERE IS IN THE STATUTE NOTHING TO SUGGEST THAT THE WORD WAS NOT USED WITH ITS OBVIOUS AND ORDINARY MEANING.

The Petitioner and the Tax Court of the United States (formerly Board of Tax Appeals) have, for themselves, answered this question. The following extract from the opinion of the Tax Court in *William R. Wallace, Jr.* v. *Commissioner, Ina Claire Wallace* v. *Commissioner* (Memo. Decisions Docket Nos. 110143, 110144. Entered May 7, 1943), illustrates and emphasizes their answer to this question:

"The cases relied upon by the respondent include *Mort L. Bixler*, 3 B. T. A. 1181; *Charles E. Duncan*, 17

B. T. A. 1088; affd., 47 Fed. (2d) 1082; *George W. Lindsay*, 34 B. T. A. 840, and *Walter M. Priddy*, 43 B. T. A. 18. We held in *Walter M. Priddy, supra*, that the living expenses of the taxpayer for a portion of the taxable year when he was required to be away from his permanent home and his family were not deductible. In our opinion we said:

"'The dispute centers around the location of Priddy's "home" as that term is used in section 23(a) of the Revenue Acts of 1934 and 1936. In *Mort L. Bixler*, 5 B. T. A. 1181, we said that a taxpayer's "home," as that term was used in the statute, was his "place of business, employment, or the post or station at which he is employed." We held that a taxpayer may not keep his place of residence at a point where he is not engaged in carrying on a trade or business and take a deduction for his living expenses while away from such residence or deduct traveling expenses for trips between his place of business and such residence. That case has been consistently followed. *Charles E. Duncan*, 17 B. T. A. 1088; affd., 47 Fed. (2d) 1082; *Jennie A. Peters*, 19 B. T. A. 901; and *George W. Lindsay*, 34 B. T. A. 840.'

* * * * * * *

"Petitioners contend, and we think correctly, that after their marriage San Francisco was the domicile or legal residence of both petitioners. However, as we have pointed out in the cases cited above, section 23(a) is not concerned with legal residence. It refers to the taxpayer's 'home,' which we have construed to mean the taxpayer's 'place of business, employment, or the post or station at which he is employed.' *Mort L. Bixler, supra.*"

Respondent's answer to this question has been set forth in striking fashion by the United States Circuit Court of Appeals for the Ninth Circuit when that Court reversed the above-quoted decision of the Tax Court (*Wallace* v.

Commissioner of Internal Revenue (two cases)[1] the Court saying, in part, as follows:

> "Our first inquiry is to ascertain whether there is any indication of an intention by Congress to employ the expression 'away from home in the pursuit of a trade or business' in the legislation under consideration other than according to the ordinary and usual meaning of the words used. The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense that nothing but the exigency of a hard case justifies,[2] and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation. This is, in effect, what has been done by the Commissioner and sustained by the Tax Court.
>
> "We have found nothing in section 23(a)(1) of the Internal Revenue Code, 26 U. S. C. A. Int. Rev. Code Sec. 23(a)(1) or in the earlier legislation from which this code provision is derived[3] which denotes any intent by Congress to attribute to the word 'home' as therein used any unusual or novel meaning.[4]
>
> "Therefore the Tax Court in its effort to differentiate between the conceded 'domicile' and 'legal residence' of both petitioners after their marriage and their 'home' at such times, has, we think, invaded the domain of Congress in construing the term 'home' as used in the statute under consideration as meaning 'the taxpayer's place of business, employment or the post or station at which he is employed.' Had Congress intended that

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[1] 144 F(2d) 407.

[2] *Lang* v. *Comissioner*, 289 U. S. 109, 53 S. Ct. 534, 77 L. Ed. 1066; *Lynch, Executrix, etc.*, v. *Alworth-Stephens Company*, 8 Cir., 294 F. 190, affirmed 267 U. S. 364, 45 S. Ct. 274, 69 L. Ed. 660.

[3] See note of Professor Erwin N. Griswold in Vol. LVI No. 7, Harvard Law Review, June, 1943, page 1140 et seq.

[4] *Coburn* v. *Commissioner*, 2 cir., 138 F. 2d 763.

the word 'home' should not be understood and applied in its ordinary sense but rather as meaning the locale of employment of the taxpayer, it would have used a more appropriate term to express such an intent.[5]

"A home in relation to the place of abode is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place.[5]

. . . . . .

"The clearly expressed purpose of Congress in enacting income tax laws is to impose tax burdens upon the *net income* of individuals,[9] and in ascertaining such income when Congress has used only literal terms in specifying the allowable deductions from gross income such meaning of deductions must be accepted by the courts unless such course would lead to absurd results.[10] We can conceive of no such results by giving to the word 'home' in the application of Section 23(a)(1) of the Internal Revenue Code its normal and customary meaning. On the other hand, to judicially innovate a meaning of 'home' as the taxpayer's 'place of business, employment, or the post or station at which he is employed,' as the Tax Court has done, would, we think, operate to thwart the obvious purpose of Congress[11] to tax *net** income and would in many cases tax the gross instead of the net income of individuals.[12] The court should function to interdict such a result.

. . . . . .

---

[5] American Law Institute, Restatement of Conflict of Laws, Section 13.

[9] 26 U. S. C. A. Int. Rev. Code, sec. 11, 52 Stat. 452; *Stewart* v. *Commissioner*, 5 Cir., 95 F. 2d 821.

[10] See *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, at pages 332, 333, 59 S. Ct. 191, 83 L. Ed. 195.

[11] *Haggar Co.* v. *Helvering*, 308 U. S. 389, at pages 394, 395, 60 S. Ct. 337, 84 L. Ed. 394.

[12] See 26 U. S. C. A. Int. Rev. Code, sec. 21, for definition of Net Income.

* Underscoring elsewhere in this Brief is ours.

> "The crucial question here is what is the proper construction to be given to an unambiguous income tax statute, and administrative decisions in such matters, while entitled to respect, are not binding upon the court.[14] It is noteworthy in this regard that the Board of Tax Appeals in situations similar to the one involved in this review has construed the word 'home' in like income tax statutes in its usual and common meaning, and not figuratively.[15]

The *Wallace* decision is a direct and authoritative review of the controlling question in this case. It puts the conflicting views of the Tax Court and of the Court of Appeals in bold relief. Here, as in the *Wallace* case, the Tax Court relied upon the *Bixler*, *Peters* and *Priddy* cases. It was on the authority of those decisions and others to the same effect that the Board of Tax Appeals denied the claimed deduction in the case of *Charles D. Coburn*, decided on March 31, 1942, Docket No. 105382, by memorandum opinion.[2]

The *Coburn* case was reviewed by the Circuit Court of Appeals, Second Circuit, and on November 29, 1943,[3] that court, speaking through Circuit Judge Swan, said, in part, as follows:

> "The opinion of the Tax Court states that whether the petitioner is entitled to the first deduction claimed turns on the meaning of the word 'home' as used in the statute; and, following its own earlier decisions, it rules that 'home' means a taxpayer's place of business or the post or station at which he is employed.' See Bixler v. Commissioner, 5 B. T. A. 1181; Duncan v.

[14] *Minnesota Tea Co.* v. *Commissioner, etc.*, 8 Cir., 76 F. 2d 797, affirmed 296 U. S. 378, 56 S. Ct. 269, 80 L. Ed. 284; *Biddle* v. *Commissioner*, etc., 2 Cir., 86 F. 2d 718.

[15] *Griesemer* v. *Commissioner*, 10 B. T. A. 386; G. C. M. 7133, VIII-2, C. B. p. 85; *Brown* v. *Commissioner*, 13 B. T. A. 832.

[2] 46 B. T. A. 1280.

[3] 138 F. 2d 763.

Commissioner, 17 B. T. A. 1088; affirmed 2 Cir. 47 F. 2d 1082; Tracy v. Commissioner, 39 B. T. A. 578; Priddy v. Commissioner, 43 B. T. A. 18. Consequently it held that the petitioner's 'home' during 1938 was in California, since he was there carrying on the business of a motion picture actor.

> "In the ordinary meaning of the word Mr. Coburn's 'home' was in New York, not in California. The Commissioner urges that the statute uses the word in a special 'tax sense' which compels the opposite conclusion. But nothing in the statute bears evidence of any unusual meaning."

The *Coburn* case was the first court review of the unusual holding of the Board of Tax Appeals in the *Bixler* case, and it is significant to note that in the *Coburn* case the court rejected the holding in the *Bixler* case and subsequent cases to the same effect. In fact, the court went even further in the *Coburn* case by holding that whether the word "home" is given its ordinary meaning or some peculiar (tax) meaning, still that Coburn's "home" within the meaning of the statute was in New York rather than in California, and his claimed deductions for traveling expenses and living expenses while away from New York should properly have been allowed. Coburn had spent 263 days of the year in California, having returned to New York only once.

So it appears that the Circuit Courts of Appeals of the Second, Fifth and Ninth Circuits have not been able to find in the statute anything to indicate that the word "home" was used with a meaning other than its well-known and universally accepted meaning. Each of those courts was called upon to deal with the insistence of the Commissioner that there is in the statute some indication pointing to a peculiar and unusual meaning. The courts have not been able to find these indications. In fact, the Commissioner has not, up to date as far as the record shows, been able

to point out the indications upon which he relies. An emergency rule of construction is invoked, but no features of the context can be located for the rule to operate upon. In the instant case the Court of Appeals said: "There is no indication in the statute of a legislative intention to give the word an unusual or extraordinary meaning" (R. 59). The Court of Appeals of the Second Circuit, in the *Coburn* case, 138 F. 2d 763, said: "but nothing in the statute bears evidence of any unusual meaning." The Court Appeals of the Ninth Circuit, in the *Wallace* case, 144 F. 2d 407, said: "We have found nothing in Section 23(a)(1) of the Internal Revenue Code * * * or the earlier legislation from which this code provision is derived which denotes any intent by Congress to attribute to the word 'home' as therein used any unusual or novel meaning."

The rules of construction employed by the Ninth Circuit in deciding the *Wallace* case are beyond controversy. They are rules that have been announced and applied by the Supreme Court of the United States many times. In *Cox* v. *Lott*, 79 U. S. 204, the court said:

> "Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning."

Typical expressions to the same effect are found in many other cases. *DeGanay* v. *Lederer*, 250 U. S. 376, 382; *Avery* v. *Commissioner*, 292 U. S. 210; *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U. S. 247; *Osaka Shosen Kaisha Line, Claimant, etc.*, v. *United States of America*, 300 U. S. 98.

The word "home" is defined in Webster's New International Dictionary, Second Edition, as "one's own dwelling place; the house in which one lives; esp., the house in

which one lives with his family; the habitual abode of one's family; also a dwelling house. The disciples went away again to their own *home*. John xx 10. 'Without hearts there is no *home*.'—Byron. The social unit formed by a family residing together in one dwelling."

In 29 *C. J.* 767, 768, it is stated that the word "home"

> "has been defined as meaning a dwelling house; a dwelling place; domicile; residence; some permanent abode or residence where the person residing intends to remain; the house or place in which one resides; the place of abode; the place of constant or permanent residence; the place where a person turns for social life, where his family, if he has one, usually dwells, and to which his mind turns when away, and where he has the present purpose of returning and remaining; the place where one and his family habitually dwell, which they may leave for temporary purposes, and to which they return when the occasion for absence no longer exists; the place where one keeps his effects, his chest, etc.; the place where one permanently resides, and to which he intends to return when away from it."

We have quoted hereinabove the following from the opinion of the Court of Appeals of the Ninth Circuit in the *Wallace* case: "Had Congress intended that the word 'home' should not be understood and applied in its ordinary sense but rather as meaning the locale of employment of the taxpayer, it would have used a more appropriate term to express such an intent." The Congress has demonstrated how easily it can do the very thing the court said it could have done in Section 23 (a) (1). In Section 374 of the Judicial Code it is provided that circuit justices and circuit and district judges shall be allowed their "reasonable expenses (not to exceed $10 per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law at

any place other than his *official place of residence.*" And further that "The *official place of residence* of each circuit and district judge. * * * shall be at *that place nearest his actual residence* at which either a circuit court of appeals or a district court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his *official place of residence.*" Section 544 of the Judicial Code allows to clerks of United States circuit courts of appeals and deputies and other assistants "their expenses of travel and subsistence, when absent from *official headquarters* on official business." Section 545 designates the place from which traveling expenses shall be allowed as "official residence." Section 560 allows traveling expenses of any clerk of a district court when he is necessarily absent from "his official residence." Section 9 (a) (c) provides for traveling expenses of the court reporters of the district courts. He is allowed such expenses "while necessarily absent on official business from the *place of his regular employment.*" (Emphasis supplied.)

So it appears that when Congress undertakes to describe the place from which traveling expenses may be allowed to the traveler by the government it is able to use language that will correctly describe such place. If in Section 23 (a) (1) Congress had meant to fix the place from which traveling expenses would be allowed as the "place of business or post of employment" those words of description could just as easily have been used as the word "home."

b. TO GIVE TO THE WORD "HOME", AS USED IN SECTION 23(a)(1), ITS USUAL AND OBVIOUS MEANING MAKES THE WORD FUNCTION IN HARMONY WITH ONE OF THE BASIC AIMS OF THE INCOME TAX STATUTES AND THAT IS TO PERMIT CITIZENS TO LIVE WHILE THEY EARN

The income tax statutes assume that the taxpayer has a home; that the home has to be maintained; that the taxpayer must provide the necessities of life for himself before he can pay taxes; that his duty to maintain a family dwelling place and to support his dependents is superior to his duty to pay taxes; even that the claim against him of his dependents has priority over the claim of his government for taxes. Hence an exemption is allowed (Sec. 25) the taxpayer for his own support and an additional exemption for each of his dependents. And Section 23(x) allows deductions for dental and medical expenses. This all recognizes that the home should come first in the appropriation of what the citizen earns; that for himself and his dependents he must first provide food, clothing, health protection, a house to live in and, for the young, education. These necessities have to be met before the taxpayer reaches the point where he can begin to pay taxes; and the citizen who is not able to earn more net income than the maximum of the exemptions and deductions allowed for himself and his dependents does not have to pay any taxes.

The exemptions allowed for the support of the taxpayer's family envision a home establishment in which the earner or producer lives with his dependents. That may be said to be the normal setup. The taxpayer is allowed to deduct from his income the amounts estimated by the makers of the law to be enough to provide the taxpayer and his dependents with the necessities of life if the taxpayer lives at home while he works and earns his income.

There is in the income tax statutes no suggestion that Congress intended to encourage the citizen to move his home as he changes his job or vocation, nor any suggestion that Congress intended to discourage citizens from accepting employment away from home. In fact, Section 23(a)(1) was intended to protect him, to an extent, if he finds it to his interest to take a job away from home.

While the exemptions and deductions allowed may be fairly sufficient to provide support for the taxpayer and his dependents when he lives at home all the time he is working and earning, they clearly are not sufficient for the purpose intended where the man not only maintains a home but goes away from home to work and thus incurs additional and unpredictable expenses in no wise entering into the fixing of the amounts of the household exemptions. In Section 23(a)(1) the Congress has clearly recognized that the arbitrary exemptions allowed to the head of a family for himself and his dependents are not adequate to take care of living necessities where the worker or earner goes away from home to work and earn. It is just as necessary for a taxpayer to eat and to have a place to sleep when he is away from home as it is when he is at home. *He may live where he pleases; he may work where he pleases; Congress has manifested no purpose to control him by taxation or otherwise in the selection of his job or of his domicile. He is not required, is under no moral obligation, to relate his domicile to his work in the way that will produce the greatest amount of tax liability.*

Not only is there no legal requirement or moral consideration to induce the conclusion that where the job is the home is, but such a rule could not be justified on the ground that it would produce more taxes. In many instances the taxpayer who for business or domestic reasons finds it improvident to move to the situs of an available job would

forego the job if he had to decide between the alternatives of paying taxes on the expenses incident to the trips made to perform the work undertaken and of breaking up his home establishment. It could hardly be expected that the taxpayer would take a job that called him away from home unless his net returns from the job would exceed the income he would have if he remained at home. This means that in most instances the Government would get more revenue from the taxpayer who goes away from home to work than it would get out of him if he remained at home even though he should be allowed the expenses incident to his trips from home. Certainly this is a safe observation to make of purely business employments.

While it is true that Section 24(a)(1) denies the right to deduct "personal, living and family expenses" from gross income in order to arrive at "net income", *these same items are taken care of in the allowance by Section 25 of credits against "net income".* These exemptions are to take care of family necessities at home. And they must serve to provide for all the taxpayer's living expenses except such as are incurred when he is away from home in the pursuit of his trade or business. Of course, if he goes on a deer hunt, or attends a ball game, or visits his grandmother, the expenses of his trip may not be allowed as a deduction. He cannot deduct living expenses incurred away from home except when the trips are made to perform the services for which he receives income.

So it appears that Congress has at every turn recognized that the cost of something to eat and a place to sleep may first be paid by the earner before he reaches the tax-paying point. If he lives at home and works, these items are covered by the arbitrary exemption allowances provided by Section 25; if he works away from home he is allowed the expense of traveling back and forth and of meals and lodging. If he travels for an employer who pays his expenses,

then these items are allowed to the employer who pays them. At every place they are taken care of, whoever pays the bill.

It takes time to build the institution called Home. It cannot be created with money alone. Not many can be established by one man for his own use. There is not time enough. It is more reasonable to ascribe to Congress the purpose to encourage citizens to give continuity and permanency to homes than the purpose, by tax regulations, to induce the citizens to try to create a new home with every change of work. The age of the Respondent is not shown in the record, but it is shown that he was admitted to the bar in 1896.

c. TO GIVE SECTION 23 (A) (1) THE MEANING PETITIONER INSISTS UPON WOULD MAKE THE SECTION OPERATE TO INFLUENCE THE CITIZEN IN LOCATING HIS HOME.

The Government does not concern itself with the manner in which the citizen manages his domestic or business affairs or his property. It leaves the citizen free to deal with both as he sees fit. It does not induce him to locate his home or his business or manage either with the object of producing revenue for the Government. It does not limit his freedom to manage his affairs in his own way by any requirement that he take that course which will best serve the Government for tax purposes. He may adopt his own program. He may properly be influenced in his selection of programs of management by tax consideration. "Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which shall best pay the Treasury; there is not even a patriotic duty to increase one's taxes." (Judge L. Hand in *Helvering* v. *Gregory*, 69 F. (2d) at p. 810). It is hardly conceivable that the Congress would require the citizen

to keep his residence at his place of business or the post of his principal employment in order that he might produce more taxes. There could possibly be no other reason to justify a requirement that he live near his business or post of employment. A member of Congress might entertain the opinion that a man can best manage his business if he lives close to it or best perform the duties of an employment if he makes his home near by. But with that, as a lawmaker, he has nothing to do. To say that the citizen must live close by his business or be denied traveling expense deductions would be to write into the statute a rule that would trammel the citizen in the management of his domestic and business affairs. A part of his freedom would thus be taken away for tax purposes. That would be a statute that would influence the selection of a home and of a vocation. If the citizen did not place his home close to his business he would be penalized by taxes on more than his net income.

It must be conceded by all of us that the Congress in the framing of income tax laws has tried to be fair and reasonable. A tax pattern is framed that leaves the citizen free to do as he pleases; free to manage his home and his property in his own way. The citizen may do what he will with his own. It would not do for Congress to say "We will allow you traveling expenses while away from home on business provided you make your home identical with your business location or place of employment. If you locate your home as we suggest then only your net income will be taxed; otherwise, we will penalize you by requiring you to pay on more income than your net." What sense there would be in such a rule is not apparent to us nor to the Treasury Department—at least the sense that would be in it has not been pointed out. We submit that the Congress did not intend to write such a rule into the statute.

There is no possibility that a taxpayer, as represented by Respondent, would set up his home away from his place of business in order to avoid taxes, that is, in order to get a deduction for traveling expenses. The loss the taxpayer bears, due to the necessity of traveling a long distance back and forth, may be three or four times the loss to the Government of revenues due to the deduction of such expenses. Certainly the taxpayer would not incur an expense loss of $1,000 in order to avoid payment of $250 in taxes. Other things being equal, of course he would rather pay $250 in taxes than $1,000 in traveling expenses.

This means that a taxpayer, situated as the Respondent was, in deciding the vital question as to whether he could afford to break up his home to take employment certain for only one year, would have to consider the substantial item of traveling expenses which he would have to pay if he kept his home where it was. Of course he would expect to get a deduction, but if that should amount to $1,000 he would save only $250 in taxes, say, leaving a net loss of $750. In other words, despite the fact that he would have a net additional loss of $750, it may be he could better afford to bear that loss than to undertake to change his existing home. We insist that Congress intended to leave him unembarrassed in the selection of his home location. If he chose to suffer the trouble and inconvenience of travel and incur the net loss of $750, that was his affair. His decision of the question was not to be influenced by the admonition: We prefer that you live at Mobile, the principal post of your employment, and if you decline to do that we will penalize you by requiring you to pay taxes on the amount of your traveling expenses incurred in carrying on your business at that post!

The Congress is concerned with the earning activities of the citizen; leaves him free to manage his domestic affairs in his own way; free to do what he pleases within the law

to earn his livelihood; permits him to pay his expenses out of his earnings before the taxed income is reached. And no statute should be so construed as to require the citizen to locate his home establishment in such way as to minimize expense deductions. The Congress should resent such a construction. It would mean that the Congress intended to complicate or embarrass the citizen in selecting his activity by saying to him that he should stay at home where the exemptions allowed by Section 25 would take care of his living expenses; that if he considered taking employment away from his existing home he must carry his home with him so that these household exemptions would still take care of his living expenses. Thus a revenue statute would intrude upon the citizen's domestic affairs as well as his business affairs.

II

Respondent's Home Was in Jackson, Mississippi, and Therefore the Expenses Incurred by Him While Traveling Away from Jackson on Business Were Deductible in Computing His Net Income.

The Petitioner concedes and the Tax Court found that Respondent's home, in the accepted or ordinary sense of the word, was in Jackson, Mississippi. The admitted facts permit no other contention or holding.

Respondent had a valid, real and substantial business purpose in maintaining his home in Jackson. He not only maintained his home there but he maintained his business establishment there and kept up his business and professional connections. In fact, he was unwilling to have it otherwise. As a condition precedent to his acceptance of employment by the Railroad, it was understood and provided for that Respondent would continue to maintain his home and his connections in Jackson. Respondent had a rea-

son for this. Not just a purely personal reason in the sense that it might be applied to his family or personal living convenience. On the other hand, Respondent's reason for demanding such a condition was a business reason in addition to personal considerations.

The testimony of Respondent on this point is especially illuminating. He said:

> "I should say that I was fairly well established in Jackson; I had lived there practically all the time since I had been (sic) there, offering my services as an attorney and the people I knew lived there and I had my home there, and I had gone to considerable expense to fix up that home and my personal and business connections were all there and I would not have been willing to take the position which I did take if it had required me to move to Mobile, and that was understood at the time, that I could live in Jackson; and then, besides, I had my firm there and my name is still in the firm and for some years I did have other business on the side, business that did not require trials that would consume time, business that involved what you might say were questions which you could take around with you and work out; and besides, I wanted to keep up my connection as far as I could, so that if I should not be re-elected the next year, I would have something to go to. I could not afford to surrender all that and sever my connections. I did not know one year whether I would be elected the next year or not" (R. 35-36).
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> . . . . . .
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> "—it has been understood, that has been intact, that understanding, all these years, that if I should lose out on this position or resign or if I should give it up, why, I have preserved my business connections there; all I have to do is just to come back to my office and go on as I was before; that has been the understanding all these years, and that has been a very material consideration with me. I didn't want to lose that reserve

and, therefore, kept my connection and kept that understanding alive" (R. 46-47).

The position originally offered Respondent, just as the position he held in 1939-1940, was one of employment by election from year to year (R. 34, 36, 37, 45). Inherent in the position was the element of uncertainty. Respondent was unwilling to sever his connection with the practice of law that he had established for himself in Jackson over a period of nearly a quarter of a century in order to take such a position. On the contrary, he demanded to be allowed to retain his established connection with the law in Jackson and he did retain this connection, continuing his participation in legal affairs and business matters in Jackson, Mississippi.

From time to time since his employment by the Railroad, Respondent had handled legal matters outside of his Railroad employment and at the time this cause was tried was actually engaged in such an outside matter (R. 47). And though he did not participate in any of the profits of his firm in which he had taken no part, he had at all times retained his connection with the firm, was a senior member of the firm, might resume participation in the firm profits at any time he wished, and, when he was in his office in Jackson, Mississippi, he was available to members of his firm for consultation on matters connected with the Railroad and matters not connected with the Railroad, and was frequently consulted by other members of his firm on both classes of questions (R. 37). In some years he had profitable business at his law office; in other years he had none.

The division of Respondent's time between his office at Jackson and his office at Mobile was left to him. As General Counsel of the Gulf, Mobile and Northern and later as Vice President and General Counsel of the Gulf, Mobile and Ohio, Respondent was responsible for the work of the Legal

Department of the Railroad. A large part of the work of this Department has to do with matters arising in the State of Mississippi, since such a large portion of the property is located in that State. Jackson is the capital of the State of Mississippi, the most important city in the State, and the most important point served by the Railroad in that State, and is the place at which the most of the Railroad's business in the State was transacted (R. 37, 38, 39, 40, 44).

The number of trips made by Respondent from his home in Jackson, Mississippi, and Mobile, Alabama, and the length of time spent in Mobile and in Jackson varied from year to year dependent upon the character of the principal problems being handled by him. During the year 1939, Respondent made 33 trips between his home in Jackson, Mississippi, and Mobile, Alabama; he was at Jackson approximately 203 days and in Mobile 66 days and was elsewhere (that is, places such as Washington, Chicago, New York, etc.) approximately 96 days. During the year 1940, he made 40 trips between his home in Jackson, Mississippi, and Mobile, Alabama; was in Jackson approximately 168 days; was in Mobile approximately 102 days, and was elsewhere (that is, places such as Washington, Chicago, New York, etc.) approximately 96 days (R. 17, 18, 38, 39).

Respondent's trips between his home in Jackson and Mobile were usually by train and necessitated, for the most part, a stopover in New Orleans for the night. He estimated that it cost between $10 and $14 to make the trip between Jackson and Mobile, in either direction, and that his living expenses in Mobile, including his hotel accommodations and meals, averaged not less than $8 per day (R. 40, 41, 42, 43).

Respondent is a lawyer. His position with the Railroad was a law position. He would not be qualified for such position if he were not a lawyer. The practice of law is regulated by the several states. Only those who have been

admitted on proper showing, regularly pay the required license fees and, where the law so requires (and the law does so require both in Mississippi and in Alabama), are members of the state bar association, are qualified to practice. Respondent could not properly hold the position he held and continue to discharge the duties of his position absent the showing on his part that he was duly qualified and licensed to practice law. *Schurer* v. *Commissioner*, 3 T. C. 544.

Respondent is a Mississippi lawyer. That is, he has been admitted to the bar in the State of Mississippi and it is under the laws of the State of Mississippi that Respondent was qualified to perform the duties required of him by the Railroad. He was a member of the Mississippi State Bar and paid the required license fees each year in the State of Mississippi.

Respondent could only earn his railroad compensation by doing the work required of him. He testified that he would not have accepted the Railroad position if it had required him to move his home away from Jackson and sever his business connections there. The Railroad agreed to these conditions. In other words, in order to perform his duties, it was necessary that he thus incur traveling expenses. While in Mobile it was necessary that he provide himself with food and lodging in order to live. These are the kinds of expenses the deduction of which is allowed and provided for in Section 23(a)(1). Had they not been incurred there would have been no business and no resulting income, and, of course, no tax. The expense and the income arose out of the same circumstances. Compare *Stewart* v. *Commissioner* (C. C. A. 5th), 95 F. (2d) 821. Without the one the other could not have resulted. They depended on each other. To sustain Petitioner's position would mean the imposition of a tax on the expense of Respondent's business, rather than on his income from the business.

Respondent was free to make his home wherever he saw fit and for whatever reason. He was free to engage in any lawful business he might desire. Since his business required him to travel away from his home and thus incur expenses, then under Section 23(a)(1) he was entitled to a deduction of those expenses from his income before paying his income tax. He cannot properly be required to pay tax on his expenses. The tax in question is a tax on *net* income, not gross income.

III

Section 23(a)(1) of the Revenue Act of 1938 Is Not Ambiguous. The Word "Home" Used in the Statute Is Not a Word of Uncertain Meaning. Hence there Is No Occasion to Invoke Various Rules of Construction.

All the argument of counsel for Petitioner assumes that the word "home" is a word of doubtful meaning. It is the use of that word which counsel say renders the provision ambiguous and warrants the invocation of the rules of construction that are employed by the courts to resolve doubts. Let it once be determined that the word in question has an established meaning, universally understood, then there remains no necessity to call in the aid of emergency rules.

Adams Express Co. v. *Kentucky*, 238 U. S. 190, 199;
United States v. *Hill*, 248 U. S. 420, 424;
United States v. *Standard Brewery*, 251 U. S. 210, 217;
United States v. *American Trucking Ass'ns*, 310 U. S. 534, 542, 543, and cases there cited.

If the court finds that the said word has a plain and commonly accepted meaning, such finding ends this controversy.

IV

The Several Rules Invoked by the Petitioner

1. *Legislative Grace*

In the first place, it is undertaken to find a burden of proof resting upon the taxpayer to show that the deduction claimed is provided for by a statute. Of course if the statute is plain the burden in the instant case is met. The rule invoked at this point is (Br. 12) the "now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing a right to the claimed deduction is on the taxpayer." It is not obvious how the enactment of a fair statutory provision may be designated as an act of legislative grace. If the expression means anything it can only mean that the Congress yielded something it did not have to yield; that it had power to do otherwise; that it could have created a burden harder for the taxpayer to bear. Perhaps the reserve of grace upon which the Congress is permitted to draw is the power to tax gross income. The Congress has not undertaken at any time to do that. It has been recognized that the expenses of earning income *must* be paid; that the real income is the difference between the amount earned and the cost of producing the earnings. Counsel for Respondent would say that to permit the expenses of earning income to be paid before the amount to be taxed is determined is an act of legislative grace; that is, that the Congress could tax the whole and that through kindness Congress permits the expenses first to be paid. Of course, no business could be carried on without expense. No income could be earned without cost. It might just as well be said that it is an act of legislative grace to allow exemptions to help take care of family living expenses, so much for the head of the family and so much for each dependent. The Congress has the

power, perhaps, to take away these exemptions and leave the head of the family under an obligation to meet taxes first and support his dependents afterwards, if anything is left of his income. Counsel would say that for Congress to permit a citizen to take care of his family is an act of grace. The taxpayer must eat, and wear clothes, and provide for himself a place to live. He is supposed to have a family, the members of which must be fed and clothed and provided with a home. The children must be sent to school. A pittance in the form of an exemption is allowed to be taken out of the total earnings to arrive at the amount to be taxed. This granting to the citizen the right to make some provision for the care of his family before he reaches the tax-paying point is, in the eye of the Petitioner, an act of legislative grace. Is it possible that any use by the Congress of less than all the power it possesses is an act of legislative grace? Does it have a reserve of royal grace upon which it can draw drafts? Is it an act of grace to do the fair and reasonable thing? Are taxpayers dependent upon legislative charity?

Mr. Justice Van Devanter seems to have first mentioned "legislative grace," in *New Colonial Co.* v. *Helvering*, 292 U. S. 435, at p. 440. There the taxpayer was claiming a deduction in one year for a loss sustained in another year and it was said that usually a year stands apart for the computation of gains and losses. And then the loss was not one originating in the taxpayer's own business but in that of a subsidiary whose losses taxpayer had contracted to pay. It might be said that it would be an act of grace to permit a taxpayer to deduct from one year's income losses suffered in a past year by another taxpayer. The court cited *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326, which also involved a claim for deduction of a loss for a previous year; and *Planters Cotton Oil Co.* v. *Hopkins*, 286 U. S. 332, involving a similar claim; and *Helvering* v.

Independent Life Insurance Co., 292 U. S. 371, wherein the court said (p. 381), "Unquestionably Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax." Congress is presumed to be fair whether it uses all or only a part of the power the people have given it. It has no reserve of grace to draw upon. The people have not provided such a reserve.

2. *The Context*

Another rule invoked is that if a word or term in a statute is of uncertain meaning the context will be examined in a search for an explanation.

At another page of this brief we have already quoted statements made by the three Circuit Courts of Appeals that first had occasion to define the word "home" as used in 23 (a) (1) to the effect that they were not able to find anything in the context to indicate that the word was used in an unusual or special sense. Counsel for Petitioner invoke the rule but have pointed out nothing in the context that can be utilized. There is in the context nothing to indicate that the word "home" as used in Section 23 was intended to mean anything except what it obviously means.

Section 24 (a) certainly cannot be held to nullify Section 23. The expenses allowed by 23 (a) (1) are such as are incurred while traveling on business. The citizen is earning income and he is allowed to pay the expenses incident to his activity. Certainly "*all* the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . traveling expenses (including the *entire* amount expended for meals and lodging) while away from home in the pursuit of a trade or business" covers items which, unless connected with the carrying on of a trade or business, are personal and living expenses. Traveling on business is one thing,

traveling on a hunting trip or on a vacation is another thing. It is not clear how counsel find in 24 (a) (1) anything to suggest some unusual meaning for the word "home" used in Section 23 (a) (1). Personal living or family expenses incurred away from home are not allowable deductions unless they are connected with the "carrying on" of a "trade or business." This is admitted. Section 24 (a) (1) may serve to help classify personal and living expenses of the kinds enumerated in 23 (a) (1)—that is, that railroad fares, meals and lodging are allowable under 23 (a) (1) when the taxpayer is away from home carrying on a trade or business but are not allowable deductions when he is traveling for non-business purposes. This meaning is recognized by counsel in their effort, by repetition, to give substance to their suggestion that this Respondent claims deductions of expenses incident to trips made from Mobile to visit his family in Jackson, when nothing of the kind occurred.

3. *Inequitable Results*

The next rule relied upon by Petitioner is that a construction that would lead to inequitable results will, if possible, be denied. It is not clear what inequitable result the Petitioner's definition of "home" would avoid. It is said (Br. 8) "It (Respondent's definition of 'home') imputes to Congress an intention to discriminate in favor of those taxpayers who are able to own or rent several dwelling places simultaneously, one where their work requires them to be and one or more elsewhere." And there is a suggestion at page 10 that to give the word its usual meaning would result in "discrimination against those whose only dwelling place is at their post of duty."

It should be clear that the man whose place of business is away from his home is the unfortunate one; that he is the man who has to bear the expense and inconvenience of

travel; the one who has the larger burden of living costs. Of course he may have a larger deduction to claim and his taxes may be reduced; but what he saves in taxes may not exceed a fourth of his deduction loss. A taxpayer cannot be regarded as favored who may spend $1000 and thereby save $250. If he happens to live at his place of business he saves the entire $1,000 and pays $250 more in taxes. Other things being equal, any taxpayer would prefer to have his home and his business at the same place. Fortunate is the man who has his home and family where his business is located. He is relieved of the worry and expense and inconvenience of monotonous travel over the same route; can have the comforts of home; can make better use of his time. The features of such cases that counsel fail to see are that deductions are *losses*; that the amount has to be paid out before it can be claimed as a deduction; that the *loss* in expenses is three or four times the *saving* in taxes.

At no time did Respondent have two "dwelling places"; his one and only "dwelling place" was at Jackson; and from that one dwelling place he made brief trips to Mobile where he engaged a hotel room for use while there just as other travelers do.

4. *Reenactment of the Statute*

The rule for which counsel for Petitioner here contend is inapplicable. Administrative construction contrary to the terms of a plain statute may not be taken as having been adopted by a subsequent reenactment of the statute. *Riddle* v. *Commissioner*, 302 U. S. 573, 582; *Iselin* v. *United States*, 270 U. S. 245, 251; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 758, 759.

As we have shown elsewhere herein, the Regulations were not and are not in conflict with the statute; they follow the words of the statute. The conflict, if any, is between the

statute and the Regulations on the one hand and departmental rulings in individual cases on the other hand, which rulings are neither made nor approved by the Secetary of the Treasury. Compare *Biddle* v. *Commissioner*, supra; *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467, 468; and *Sandford's Estate* v. *Commissioner*, 308 U. S. 39, 53.

Even if these segregated rulings could be treated as being on a basis of equality with the Regulations to which they are opposed, they could not be permitted to work a modification or repeal of the statute. The lawmaking power is in the Congress, not the executive branch of our Government. The Congress has not delegated and cannot delegate its legislative power. Laws are not made by or through the medium of informal administrative rulings which amount to little more than interdepartmental memoranda. *Manhatten Co.* v. *Commissioner*, 297 U. S. 129, 134, 135; *Helvering* v. *Oregon Ins. Co.*, 311 U. S 267, 271-272; *Taft* v. *Helvering*, 311 U. S. 195, 198-199; *Miller* v. *United States*, 294 U. S. 435, 439-440; *Helvering* v. *Powers*, 293 U. S. 214, 224; *Lynch* v. *Tilden Co.*, 265 U. S. 315, 321; *United States* v. *George*, 228 U. S. 14, 22; *United States* v. *United Verde Coffee Co.*, 196 U. S. 207, 215; *United States* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571, 576.

V

As to the Construction of the Statute by the Tax Court and the Treasury Department

The Treasury Regulations embody the authoritative rules of the Treasury Department adopted for the practical application of the revenue statutes (I. R. C., Sec. 4041, Sec. 3591 and Sec. 62). They deal with the facts of no single case; they make public the rules that the Bureau of Internal Revenue is expected to apply.

The Secretary promulgated a rule with respect to Section 214 (a) (1) of the Revenue Act of 1921. The Regulation was approved February 15, 1922. It has been in force in substantially the same form as when first adopted, up to the present time. The section of the 1921 Act with which that Regulation dealt was, as to the provisions with which we are now concerned, the same as Section 23 (a) (1) of the Act of 1938.. Said Regulation appears in the appendix to the brief of the Petitioner. It will be noted that the language of paragraph (a) (1) of the Regulation is practically the same as the language of the paragraph so numbered of the Act. The Regulation uses the language "traveling while away from home solely in the pursuit of a trade or business." The language used is exactly that used in the statute except that the Regulation introduces the word "solely." There is in the Regulation no suggestion that the word "home" means other than what it ordinarily means; no suggestion of ambiguity to be cleared up. It follows the language of the statute. *If the statute is ambiguous then the Regulation is equally ambiguous.*

If the Department found in the statute a common word whose meaning is familiar to everybody and discovered at the same time that this word was to be given a different meaning, certainly the occasion called for an announcement of the meaning the Department proposed to give it. If the draftsman was advised of the unusual meaning that was to be given to the word it is difficult to see how he could be blind to the necessity of advising the public of the special meaning proposed to be given it. We can hardly avoid the inference that the authors of the Regulation were not willing to commit themselves to a definition of the word that would be such a radical departure from the meaning of the term that people in general give to it. The peculiar definition has been kept out of the authoritative and final rules promulgated for public use. The silence of the Regulation

on the subject indicates, at the minimum, that the special meaning had not yet been discovered, or if it had been suggested, uncertainty or lack of confidence on the part of the authors of the Regulation. To put the special definition in a Regulation would be a challenge.

The Regulation does itemize to an extent traveling expenses "as ordinarily understood," including railroad fares, meals and lodging. But the Regulation recognizes no necessity to throw any light on the meaning of the word "home" as a designation of the place from which the taxpayer may be traveling when he incurs expenses that are allowable deductions. It assumes, as a matter of course, that everybody knows what the place is that is called home; no explanation is needed; the term is well understood and needs no definition. It may be assumed that counsel for the Department who drafted or approved the Regulation was familiar with the rule so well expressed by the Court in *Addison v. Holly Hill Co.* (322 U. S. 607, 618), that "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Six of the eight paragraphs of the Regulation deal with traveling expenses. The word "home" is mentioned more than once as the designation of the place from which the taxpayer must have traveled. It was assumed that the word as used in the statute had no hidden or special meaning of which the public should be advised.

And there is no Treasury decision that commits the Department to the definition Petitioner depends upon in the instant case. At least we have found no such decision, and counsel for Petitioner cite none. We submit to the Court that the Board of Tax Appeals in the *Bixler* case, 5 B. T. A.

1181, originated the wry definition of home that Petitioner here relies upon. We have seen that in that case the taxpayer did not appear by counsel; that the new definition had nobody vouch for it but the Board; that no reasons were given, no authority cited. Certain it is that the Treasury Regulation (then designated as Article 101 (a) of Reg. 62) was not cited by the Board, although the regulation, substantially in the form of the current Sec. 19.23 (a) (1) and (2), was about five years old. Certain it is, too, that the said Regulation, if cited, would have furnished no encouragement to the Board in adopting the new definition.

And even after the Regulation was promulgated there were decisions by the income tax unit (not cited by counsel for Petitioner) that gave to the word "home" the same meaning Respondent here insists that it has and has always had. In IT 1490 and IT 1497, p. 89, Cum. Bull. 1-2 (July-Dec. 1922), Webster's International Dictionary is depended upon for the definition of "home." Both of these decisions purported to be in accord with the Regulation and to have been controlled by it.

As far as we have found, the Bureau of Internal Revenue never employed the *Bixler* definition of the word "home" until the year 1928, a year after the *Bixler* decision. (G. C. M. 4956, Cum. Bull. VII-2, p. 129, July-Dec. 1928).

And if the *Bixler* decision discovered a new meaning for the word the Department did not change its Regulation to conform to the discovery. It is evident that no such special meaning was attributed to the word when the said Regulation was drafted. *It may be safely affirmed that if there had been any confidence in the Bixler definition and the Department was willing therefore to back it, the Regulation would have been amended accordingly.*

Counsel for Petitioner does not insist that the Regulation supports their theory; it is only said that it is consonant

with their theory (Br. 9). But it is "consonant" with counsel's theory only provided the term is given a meaning that is not indicated by the manner of the use of it in the Regulation.

And the Board of Tax Appeals has not consistently followed the *Bixler* decision. It can only be safely said that the Board of Tax Appeals has followed it in the *Priddy* (43 B. T. A. 18), *Peters* (19 B. T. A. 901), and *Lindsay* (34 B. T. A. 840) cases. See *McCruden* v. *Commissioner*, Docket No. 87806 (entered Feb. 7, 1938); *Brown* v. *Commissioner*, 13 B. T. A. 832; *Joseph W. Powell* v. *Commissioner*, 34 B. T. A. 655; and other cases cited herein.

And the first time the question reached a court the rule of the *Bixler* decision was condemned (*Coburn* v. *Commissioner, supra*, Second Circuit). And the second time the question was presented to a court was in the *Wallace* case (*Wallace* v. *Commissioner, supra*, Ninth Circuit). Here again it was condemned in emphatic language. The third time the question got into court was in the instant case (Fifth Circuit), where the rule of the *Bixler* decision was again convicted of being unsound.

And after the Court of Appeals of the Second Circuit, in the *Coburn* case, refused to adopt the special definition of the word "home" the Tax Court began to treat the *Bixler* decision as being of little use. It is now in disrepute. *Harry F. Schurer*, 3 T. C. 554; *Gustafson* v. *Commissioner*, 3 T. C. 998; *Harroun* v. *Commissioner* (Memo. opinion, Docket No. 5869, entered July 20, 1945); *Mahony* v. *Commissioner*, —— T. C. —— (entered April 10, 1945); *McLennon* v. *Commissioner*, —— T. C. —— (June 25, 1945); *Robert S. Shelley, deceased*, v. *Commissioner*, —— T. C. —— (June 25, 1945).

Our confidence in the position of the Respondent in this case is strengthened by the absence from the opinions of the Courts of Appeals of the Second, Ninth and Fifth Cir-

cuits of statements as to the history of the present Regulation (Section 19.23(a)(1)) and as to the origin of the peculiar definition of home depended upon by Petitioner. And there is nothing in the opinion of the Court of Appeals of the Fourth Circuit in the *Barnhill* case to indicate that that court was in possession of these historical facts.

Treasury Regulations in Effect Prior to the 1921 Prototype of Section 23(a)(1).—Those Regulations shed light on the meaning of the word "home" as used in 23(a)(1) and on the use of the word "all" and of the word "entire." Treasury Decision 3101 (3 Cum. Bull., page 191), approved December 16, 1920, amended Article 292 of Regulations 45. Former Regulations had allowed one traveling on business "only his railroad fares and other incidental expenses attributed to the business and no expenses for meals and lodging were deductible for income tax purposes, on the theory that expenses for meals and lodging were necessary expenses within the purview of Section 215 of the Revenue Act of 1918." (Cum. Bull. No. 4, page 209, Memo. 2688.) The amended Article 292, approved December 16, 1920, allowed a taxpayer traveling on business not only his railroad fare but meals and lodging. However, the amount he could get for meals and lodging was measured by his expenses at home. He had to attach to his returns statements showing to what extent his living expenses were increased by his traveling away from home. Attention was given to the fact that his living expenses when at home were taken care of by the exemptions which at that time were $2000 for the head of the family and $100 for each dependent, and for a single man $1000. The home the Regulation dealt with was the place where the family lived. There is no intimation as to where the home should be located with respect to the business on which he was traveling. In the prior Regulation the theory was that the cost of meals and lodging was covered by the household exemptions,

whether incurred at home or away from home; that the only additional expense incident to traveling that was allowable was the transportation expense, railroad fares. The idea was that the taxpayer with a family at home was alread getting a deduction to cover the cost of meals and lodging and that if this should be allowed to him as an incident of his traveling he would get two deductions of the same expense. In other words, under the prior Regulations the taxpayer could deduct no part of his expense for meals and lodging, but under the 1920 amendment (Article 292 of Regulations 45) he was allowed such portion of his living expenses when traveling as he was able to show was in excess of such expenses when at home. He had to show how much his living expenses were increased by his traveling on business.

But after the enactment of Section 23(a)(1) (214(a)(1) of the Revenue Act of 1921) a new Regulation was adopted, to give effect to the new provisions, which adopted a theory wholly different from that of the preceding Treasury Regulations. Whereas Article 292, promulgated the year before, allowed the man traveling on business a deduction of a part of his living expenses while away from home, and the same Regulation prior to January 1, 1921, allowed him no part of such traveling expenses, the new Regulation (in substantially the same form as the present Section 19.23(a)(1)), following the language of the 1921 statute, allowed him all his traveling expenses. The Treasury Regulation evidently prompted the use by the Congress of the word "all" in defining business expenses and the use of the word "entire" in defining the traveling expenses that should be allowed. The use of these words recognizes that theretofore the man traveling from home could get only a part: the Congress said that he was entitled to the "entire amount expended for meals and lodging." It was intended to make

it certain that his expenses when traveling away from home on business should be treated as additional living expenses no part of which was covered by his household exemptions.

It is expressly to be noted in this connection that the *home* referred to in Article 292 of Regulations 45 was the institution that everybody knows by the name of home. And we have seen that in the year 1922 the Income Tax Division of the Department was using the same definition of the word "home" that we here insist upon and even citing the same authority. (See opinions cited at page ——, supra.) There was no requirement that the taxpayer make a showing as to how his home was located in relation to his business or employment. All travelers away from home were treated alike. There was in the previous enforcement of the statute by the Treasury Department no suggestion to indicate to the Congress that the word "home" had acquired or was to be given any novel or unusual meaning.

When the 1921 Revenue Bill was under consideration, the Committee on Ways and Means in its report on the measure said: "Section 213 would permit (in the computation of net income) the deduction of all traveling expenses incurred in the pursuit of a trade or business, instead of the more limited deduction for such expenses allowed under the present law." (Cum. Bull. 1939-1, par. 2, p. 177.) We have elsewhere called attention to the fact that the Bureau of Internal Revenue had adopted the definition of the word "home" found in Webster's International Dictionary.

As to the exception in 19.23(a) (1) of the Treasury Regulations of commuters' fares from allowable business expenses. We have above herein called attention to the fact that the Regulation dealing with 23 (a) (1) does not undertake to explain 23 (a) (1); does not ascribe to it any meaning other than what it obviously carries; does not attribute to the word "home" any meaning other than that it ordi-

narily implies. But counsel for Petitioner refer to the last paragraph of the Regulation as furnishing support for their contention that the word "home" is treated as having a peculiar meaning.

It is necessarily a question of fact in every case as to where the taxpayer's home was at the time traveling expenses were incurred. In the instant case this question of fact is not in dispute. It is conceded that the taxpayer had in Jackson, Mississippi, a long-established home where he lived with his family throughout the period involved. He lived some 200 miles from the post of his principal employment, and when he traveled by rail the distance was approximately 340 miles.

But where the citizen lives near his place of employment the question may arise as to whether he is traveling on business when he goes from his home to that place. It would hardly be contended that the man who lives and works in the same city travels away from home when he goes in the morning to his place of employment, although he may have to travel miles; nor would it be so contended as to any man who lives so close to the city where he works as to make his home, in the general view, identical with the city. As the distance between the home and the place of business increases, the nearer the approach to a doubtful question of fact. The man in the suburbs or in an adjacent town or city may still be so near his place of business as to preclude any dispute as to whether in going to and from his place of business he is *traveling* within the generally accepted meaning of that word. The term "travel" usually connotes some considerable distance, "to make a journey; to pass to a distant place or to many places" (Webster's International). The Regulation undertakes to dispose of the question in so far as it may arise with respect to persons located within a certain definable area around the place of business. It provides that "commuters' fares are not con-

sidered as business expenses and are not deductible." The evident purpose was to exclude commuters from the category of travelers; to make it plain that the Bureau would not regard the expenses of commuters going to and from their places of business as traveling expenses. It covers income tax questions for a large class of taxpayers. The word "commuter" is not in the statute. When it was adopted by the Treasury Department it had a well-known meaning. Perhaps the Interstate Commerce Commission has furnished the best statement as to the history and meaning of the word in 21 I. C. C. 428. It is there explained that the commuter rides from his home in a suburban or nearby community to his place of business and back; usually makes the trip every day; uses some kind of coupon tickets, gets low rates. The Supreme Court said, in *Pennsylvania Railroad Company* v. *Towers*, 245 U. S. 6, 12, "The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the one-way passenger.

"It is well known that there have grown up near to all the large cities of this country suburban communities which require this peculiar service, and as to which the railroads have themselves, as in this instance, established commutation rates. * * * On the strength of these commutation tariffs, it is a fact of public history that thousands of persons have acquired homes in city suburbs and nearby towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic." The Regulation provision had the purpose of making it clear that commuters would not be treated by the Bureau of Internal Revenue as persons traveling away from home on business when they go from their homes to their places of business or employment. They are not to be treated as travelers. Their expense is relatively small;

they spend usually as much of the 24 hours at home as they spend away from home. It is part of their daily routine. They do not have the inconveniences or the expenses of travelers away from home. The home exemptions take care of their living expenses approximately as if they had their home and employment under the same roof.

But certainly this treatment of commuters' expenses ascribes no special meaning to the word "home". It only defines a class of persons who shall be treated as having their home and their business at the same place. Persons in this class are not to be given the deductions allowed to those who travel away from home. They are not travelers. The assumption would be that persons going away from home to work, who are not commuters, are entitled to the traveling expense deduction. This is the only class that the Regulation defines; and it was appropriate for the Regulation thus to define a class of persons whose situation would take them out of the category of travelers. It is in harmony with the statute as we construe the statute. It gives no unusual meaning to the word "home" but only lays down the rule that commuters shall be treated as living and working at home without any necessity for travel. The time and inconvenience and distance incident to travel are not present in the commuter arrangement. The rule has a bearing upon the income tax returns of (according to the Supreme Court) "thousands of persons."

Conclusion

The facts in this case are not in dispute. The Respondent claims deductions for expenses paid by him while away from home on business. The abode he was away from was his real "home" as that word is commonly understood. It was not a temporary establishment. At the beginning of 1939 it was some 27 years old.

The sole issue arises over the meaning of the word "home" as used in Section 23(a)(1). Petitioner contends that the word was intended to be given an unusual meaning. The meaning contended for by the Petitioner is not disclosed by the statute. The statute contains no definition of the word. It needed no definition. Petitioner contends that the meaning he proposes for the word has been attached to it by administrative action.

Since it is one of the most familiar words in the language its use could create no ambiguity. No different meaning could be injected into it by the Treasury Department. The only rule of construction that is applicable is the rule that the plain words of a statute are to be taken as expressing the intent of the legislature. Other rules are invoked as aids in instances where the terms of a statute are not plain. The Congress is presumed to have said what it intended.

Moreover, Petitioner has wholly failed to show that the Department has ever adopted or approved a definition at variance with the universally accepted meaning of the word.

The one Regulation, Section 19.23(a)(1), has been in its current form, in so far as its application here is concerned, since 1921. It follows the language of the statute. If the Department had in mind a novel definition of the word the place to make it known was in this Regulation. The office decisions made in 1922 (IT 1490 and 1497, p. 89, Cum. Bull. II2, July-Dec. 1922), after the promulgation of the said Regulation, indicate that there was in the atmosphere of the Department no notion that the word "home" used in the Regulation had an undisclosed meaning. The definition used was that found in Webster's Dictionary.

We submit that there is no indication in the record of the Department's acts to indicate that the definition insisted upon was even thought of at the time the Regulation was promulgated or for years thereafter; that the suggestion

was first made by the Board of Tax Appeals in the *Bixler* case. And further that the rule proposed in the *Bixler* case was a mere *ipse dixit*, having no reason or authority to support it. The Bureau of Internal Revenue has made use of it now and then where it could be employed to advantage, but the Treasury Department has never committed itself to it by any Regulation, nor, in so far as we or counsel for Petitioner have discovered, by any Department decision.

The Board of Tax Appeals applied the new rule in a few cases and managed to avoid it in a number of others. And the Tax Court, as shown by cases cited in this brief, has practically repudiated it without expressly saying so.

The issue created by the Board of Tax Appeals' proposed definition did not get into the courts till 1943 when it turned up in the Circuit Court of Appeals for the Second Circuit. That court refused to approve the *Bixler* case definition. Then the issue arose in the Circuit Court of Appeals of the Ninth Circuit and was condemned in language quite positive. Its next appearance was in the instant case and the Court of Appeals for the Fifth Circuit also found no support in the statute for the peculiar definition first employed in the *Bixler* case.

Each of the said Circuit Courts of Appeals, examined the statute to see what there is in the context to indicate that the term "home" was intended by the Congress to be given an unusual meaning. None of these courts found anything of that nature. If there is any such illuminating feature in the context, certainly it is hard to find or one of these able courts would have discovered it. On the other hand, the history of the statute and of the changes in the Regulation that resulted in the current Regulation, 19.23(a)(1), shows that the Department clearly saw the pattern Congress had framed with this Section 23(a)(1) in it. Families at home were to be provided for; and exemptions for that purpose were allowed. Some

citizens find it to their interest to go away from home to work; and such travelers away from home also have to live; on trips from home they incur living expenses not covered by the household exemptions. But the citizen going away from home may deduct only such expenses as are incident to his business activity; he cannot deduct traveling expenses incident to pleasure or social or other non-business travel (Sec. 24).

The Congress intends to tax *net* income. There can be no net till the expense incident to the earning is paid. The citizen is free to manage his domestic and business affairs in his own way. If he can earn more income, that is, if it is to his interest to go away from home, Congress says to him that the incidental expenses will be allowed. The location of his home is an important matter with the citizen. Congress knows that. To break it up and move it and establish it somewhere else is a matter of large importance to the family. The Congress leaves him to deal with that problem in his own way. To help him to deal with it, however, the Congress tells him that if he does find it to his interest to go away from home to carry on a trade or business his expenses incidental to his business trips may be deducted from his income before the tax rates begin to attach. The Congress gives the citizen the right to deduct his traveling expenses when on business trips away from home. There is attached to this grant no condition to the effect that such expenses will be allowed only provided the citizen will establish his home close to his principal business. Such a condition, Petitioner insists is implied. Such a condition, written into the act, would be of as vital importance as the grant itself. In the *Bixler* case it was undertaken to write such a condition into the statute.

The present statute and the present Regulation, as shown by their history, were the outcome of controversies with respect to expense deductions. At first, living expenses

incurred by the taxpayer when away from home were not allowed, the assumption being that his household exemptions took care of that. The next step was to allow him living expenses when away from home if he was able to show that they exceeded the living expenses he would have incurred if he had stayed at home. And then the Act of 1921 gave him the right to deduct all such expenses, including the *entire* amount expended for meals and lodging. While these said controversies were on, as far as the record shows, there was no uncertainty as to what was the "home" from which the traveling expenses were to be measured.

All we have said herein is supported by the decision of the Court of Appeals of the Fifth Circuit, which decision, we submit, was correct and should be affirmed.

Respectfully submitted,

JAMES N. OGDEN,
Counsel for Respondent.

December, 1945.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 145

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

J. N. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

J. N. FLOWERS
By James N. Ogden,
Counsel.

January, 1946.

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PETITION FOR REHEARING

To the Honorable, the Supreme Court of the United States:

Comes now J. N. FLOWERS, Respondent in this case, and respectfully petitions the court for a rehearing and assigns as grounds the following:

I.

THE OPINION OF THE COURT RENDERED HEREIN ON JANUARY 2, 1946, MAKES THE DECISION TURN UPON A POINT RAISED BY THE COURT AFTER THE CAUSE WAS SUBMITTED, A POINT OR ISSUE NOT CONSIDERED BY THE TAX COURT OR THE COURT OF APPEALS OF THE FIFTH CIRCUIT AND NOT RAISED OR DISCUSSED BY COUNSEL IN BRIEFS OR IN ORAL ARGUMENT.

THE SAID POINT OR ISSUE IS AS TO THE MEANING OF THE WORD "BUSINESS" APPEARING IN THE CLAUSE IN SECTION 23(a)(1)(A) READING "TRAVELING EXPENSES (INCLUDING THE ENTIRE AMOUNT EXPENDED FOR MEALS AND LODGING) WHILE AWAY FROM HOME ON *BUSINESS*" (Emphasis Supplied), THE COURT INTERPRETING THE TERM AS MEANING "BUSINESS OF THE EMPLOYER."

The case was tried in the Tax Court and in the Court of Appeals as one involving the business of the taxpayer and, specifically, deductions claimed by the taxpayer from his gross income for expenses incurred by the taxpayer in the pursuit of his own trade or business. It has not been contended by counsel on either side that inquiry should be made as to whether the expenses claimed were incurred in the promotion of the business of the taxpayer's employer. It is not the railroad who is claiming the deduction; it is not the railroad's income sought to be taxed. The question of the relation of the expenses to the business of

the taxpayer's employer was not treated as an issue by the Tax Court or by the Court of Appeals, and was not considered by either of them; was not raised by counsel for the Commissioner in their assignment of errors in this Court or in their brief. The Court raised the issue after the cause was submitted. Hence it is that counsel for the Respondent has not had any opportunity to be heard on this new question. That a question was not raised in the courts below and was not raised by counsel in their assignment of errors but was discovered by the Court after final submission should be sufficient to support a petition for rehearing.

Especially should the discovery by the Court of an issue after the cause is finally submitted call for a rehearing where the newly discovered issue is made the controlling one. Here the majority opinion bases the reversal upon its finding that the word "business" as used in the statute refers to the business of the employer. No such meaning has been attributed to the word by the Commissioner in any instance as far as we are advised and certainly no such meaning has been attributed to the word by counsel for the Commissioner in this cause.

It is to be noted that the Court refers to no precedent for its definition of the word "business" as "business of the employer". It is also to be noted that, in this connection, no mention is made of Treasury Regulations 103, Sec. 19.23(a)-1 and Sec. 19.23 (a)-2. The first of these sections expressly relates the "deductible" expenses with "the taxpayer's trade or business". *This is directly opposed to the definition the majority opinion adopts.* This Regulation is relied

upon by the Government and is reproduced in full in the appendix to the brief for the Commissioner in this Court. It is the same language that appeared in its predecessors beginning with Article 101 of Regulations 65 promulgated under the Revenue Act of 1924. The above-quoted portion of Sec. 19.23(a)-1 deals *generally* with deductible business expenses, but in the majority opinion the Court has held that traveling expenses make up one of the items, "one of the specific examples given by Congress in that section [Sec. 23(a)(1)(A)]. 'of ordinary and necessary expenses paid or incurred in the taxable year in carrying on any trade or business' ". In other words, the Regulation (19.23(a)-1) undertakes to explain Sec. 23(a)(1)(A) of the Code. It is the *taxpayer* whose income is being dealt with; it is his business with relation to which deductible expenses must have been incurred; it is his own net income that is to be computed; it is amounts expended by him in the pursuit of *his own* business that are deductible from his gross to determine his net. We respectfully suggest that the Court has overlooked this Regulation of long standing, the Regulation relied upon by the Commissioner in this case. It appears quite clear why counsel for the Government were not in position to contend for the interpretation which the Court has adopted.

And now we call attention to paragraph (a) of Sec. 19-23(a)-2, set forth in full at Page 36 of the brief for the Commissioner. This Regulation deals *specifically* with traveling expenses as business expenses. The said paragraph is:

> "(a) If, then, an individual, whose business requires him to travel, receives a salary as full

compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income."

It is clear that in applying this Regulation no inquiry needs to be made as to whether the expenditures for meals and lodging were of benefit to or helped to promote the business of the employer of the taxpayer who made the expenditures. The Regulation deals with the taxpayer as *having a business of his own although he may be employed by another*. His business is to perform the services that he has contracted to perform; to do the work he has obligated himself to do is his occupation, his trade or business, whoever may be interested in the results of his activities. The citizen may thus create for himself a business. In the pursuit of the business thus created he receives an income and the statute and the Regulations both recognize his right to deduct the expense he incurs in carrying on his business. In the majority opinion the above quoted Regulation is indorsed, "is deemed to possess implied legislative approval and to have the effect of law". And while the opinion quotes other portions of Sec. 19.23(a)-2 it makes no mention of the above quoted paragraph, *the one directly applicable to the instant case.*

When we venture the statement that paragraph (a) above quoted rules this case if applied as written, we recognize that the answer that has been offered throughout this hearing is still available, and that is, that this taxpayer was not traveling on business when

he incurred the expenses which he deducted. That is the only answer. If this taxpayer was "traveling" within the meaning of paragraph (a), then he is entitled to the deduction; and he was so traveling unless the word "home" is to be given the meaning that the Commissioner and the Tax Court attribute to it. In other words, we come back to the issue which the Court has put to one side as not necessary to be passed upon, that is, as to the meaning of the word "home". If paragraph (a) applies here, the judgment of the lower court should be affirmed. It does apply, if this taxpayer was traveling away from home on business. He was so traveling unless his "home" was his "principal post or place of employment".

II.

EVEN THOUGH, IN THE VIEW OF THE COURT, THE ISSUE AS TO WHETHER THE EMPLOYE'S TRAVELING EXPENSES MUST BE RELATED TO THE BUSINESS OF THE EMPLOYER IS PRESENTED BY THE RECORD, IT IS NOT OPEN TO DISPUTE THAT THE SAID ISSUE HAD NOT BEEN RAISED BY COUNSEL AND WAS NOT RECOGNIZED BY THE COURT OF APPEALS AS AN ISSUE IN THE CASE AND WAS NOT MENTIONED BY THE TAX COURT.

It is not often that this Court will permit counsel to have another try at issues which they have already argued but it would not appear to be fair to deny the opportunity to have one try at whatever important issue may be involved in a case before this Court even though it should be thought that counsel themselves,

before the cause was submitted, should have discovered the issue. Counsel can hardly be charged with lack of attention when an issue, as is the one here involved, is so concealed as to escape the notice of the Tax Court and of the Court of Appeals and so obscure as to escape the attention of experienced counsel for the Government who are presumed to know all the definitions of statutory terms that the Commissioner adopts in his eagerness to collect taxes. We also have the support of the learned author of the dissenting opinion who found the only issue presented by the record to be as to the meaning of the word "home".

We call attention to the enumeration of conditions which the majority opinion says must be satisfied to support a claimed deduction of traveling expenses.

"(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

"(2) The expense must be incurred 'while away from home'.

"(3) The expense must be incurred in pursuit of business."

That statement of conditions follows the statute. Without the Court's explanation of number 3 it would be clear that they have all been met by the taxpayer here. It is the explanation of number 3 that introduces the issue that counsel and courts have not dealt with or recognized as being presented by this record. The issue

is created by the addition of the words "or of his employer" at the end of the first sentence of the explanation. Thenceforth the opinion deals with the inquiry as to the relation of the claimed expenditures to the business of the railroad, deals with the taxpayer as having no business, and finds that the "discussion (by the Tax Court) was directed mainly toward the relation of the expenditures to the railroad's business"! (In the light of that statement we ask the Court to read again the opinion of the Tax Court, Tr., page 21.)

In the course of the majority opinion the following statement appears: "There is no claim that the Tax Court misconstrued this condition (referring to condition number 3) or used improper standards in applying it". This statement of the Court, to have any validity, must presuppose that the "condition" with its explanation has been before the courts and counsel throughout. But the condition as explained made its first appearance in the opinion of this Court; counsel could not question it or question the action of the trial court with respect to it because they did not know that it was in existence.

III.

THE FACTS ACCEPTED BY THE MAJORITY AS BEING ESTABLISHED REQUIRE AN AFFIRMANCE OF THE JUDGMENT OF THE COURT OF APPEALS PROVIDED THAT COURT CORRECTLY DEFINED THE WORD "HOME" UNLESS IT SHOULD BE DECIDED THAT AN EMPLOYE DOES NOT HAVE A TRADE OR BUSINESS.

The following are admitted facts.

1. The taxpayer had his permanent home in Jackson. He had lived continuously on the same lot since 1912 and in Jackson since 1903.

2. He accepted employment to perform professional services away from home.

3. His employment required that he make trips away from his home in order to perform the services for which he received compensation.

4. All the expenses for which he claimed deductions were incurred on business trips.

5. The expenses were reasonable and necessary, were for food, lodging and travel.

The statute and the Regulations, taken at their face value, allow the deductions in cases where the above enumerated facts are found.

a. The Tax Court applied the statute and the Regulations as written except that it attributed to the work "home" a special meaning. Hence it denied the deduction on the ground that the taxpayer was not

"away from home". That this is the basis of the Tax Court's decision is unmistakably evidenced by the nature of the authorities cited (Tr. 21). Bixler, Peters, and Priddy were all away from their regular homes when the expenses claimed as deductions were incurred. The Tax Court disallowed the deductions because the word "home" was treated as meaning the principal post of employment. There is no intimation that the Tax Court even thought of inquiring whether the expenses were to be related to the employer's business. To inject that consideration into the Tax Court's reasoning is to pursue a course which the learned author of the majority opinion himself condemned in *Commissioner* v. *Scottish-American Investment Company*, 323 U. S. pp. 123-124.

b. Then this Court declines to following the apparent meaning of the statute and the plain meaning of the Regulations and denies the deduction, not on the ground that the taxpayer was not "away from home", but on the ground that the expenses incurred were not related to the business of the taxpayer's employer.

Both denials of the deduction, that by the Tax Court and that by this Court, subtract something from the par value of the statute. Neither of them depends upon any regulations' definitions of the words involved.

The reason is not clear why the Court and the Commissioner should be so concerned with the selection by the citizen of a location for his home establishment. It is apparent that the Congress has faithfully tried to impose the tax on no more than net income;

has tried to give full recognition to the fact that there is no net until incidental expenses are paid, has manifested no purpose to require a citizen to establish his home in such way as to reduce the expense incidental to the earning of his income. In special instances where net income worked out under general rules for year periods has not seemed to produce equitable results the Congress has drawn upon its recently discovered stock of "grace" in order more accurately to achieve the purpose of taxing not more than net income. Such failures of the general rules to produce equitable results have been occasions for the use of "grace". *Woolford Realty Company* v. *Rose*, 286 U. S. 319; *Planters Cotton Oil Company* v. *Hopkins*, 286 U. S. 332. The statutory plan is (1) to impose a tax on net income (Sec. 11); (2) ascertain gross income (Sec. 22); (3) deduct expenses and losses incurred in earning the income (Sec. 23); (4) deduct from the net income a stated sum to take care of the personal living expenses of the taxpayer and his family, items given preference over taxes (Sec. 25). The statute contains no remotest suggestion that a taxpayer should have his home where he works. That limitation upon the right of the taxpayer to deduct incidental expenses originated with the Board of Tax Appeals in the *Bixler* case. And it has never been embodied in the Regulations.

IV.

THE RIVAL THEORIES.

1. The Tax Court and the Court of Appeals both dealt with the taxpayer as having a trade or business

as those terms are used in Sec. 23 of the Code. The Court of Appeals would have affirmed the action of the trial court if it had agreed with the latter on the meaning of the word "home". Both assumed that the taxpayer was pursuing a "trade or business" without inquiring whose "trade or business" it was. (The statute reads "a trade or business"). And we have seen that paragraphs (b) and (c) of Sec. 19.23(a)-2 of Regulations 103 treat an employe as having a trade or business of his own. 4 Mertens, Law of Federal Income Taxation, Sec. 25.85. And the minority opinion of this Court follows the same theory.

2. The majority opinion finds it unnecessary to define the word "home"; takes up the word "business" and defines it; and then reaches the conclusion that the taxpayer's traveling did not relate to or promote the "business" as it defines that term.

It is to be kept in mind that no definition of "home" or of "business" appears in the Regulations. And further that there has been no such uniform and certain use of the definition of "home" that the Commissioner proposes as to impute the scienter to Congress that an amendment of the statute was ripening in the Bureau of Internal Revenue. Certainly Congress is not to be assumed to have knowledge of something that the courts are not able to find after trials involving the very issue as to whether a modification of a statute has been effected by administrative action.

We experience some difficulty in determining what the language of the Court means, just what the reasoning is. The travel expense provision is for the benefit

of individuals. Corporations do not travel; only individuals travel. If the employer in this instance had contracted with the taxpayer to pay him a salary plus the expenses of his trips to Mobile, certainly the railroad would have been entitled to the deduction. And under paragraph (b) of Sec. 19.23(a)-2 of Regulations 103 he would have been required to include the expenses of his trips in his gross income. The railroad would have the deduction of the amount as an expense item. In other words, if the railroad had paid the expenses the deduction would have been allowed. It is not clear why it should not be allowed if paid by the taxpayer out of his salary. And if the railroad had paid the expenses and taken the deduction the loss in revenues to the Government would have been much larger than if the deductions were taken by the taxpayer. No reason appears why, if the railroad paid the expense it would be deductible but not deductible if the employe pays it.

While the traveling expenses provision in Sec. 23(a)(1)(A) had in view the cases of traveling salesmen, most of whom are employes, it applies to others who follow a similar plan of earning income. It was intended to apply to all who make trips away from home as frequently as they deem such trips necessary to the proper performance of the duties of their employment. See 4 Mertens, Law of Federal Income Taxation, Secs. 25.82 - 25.85.

We are not able to determine whether the majority opinion permits inquiry into the reasons of the taxpayer for maintaining his home at a place distant from his post of employment when the reasonableness of expense items is an issue.

The decision as rendered, if allowed to stand, will not allay as much confusion as it will create.

For the reasons stated, we submit that this petition should be granted.

Respectfully submitted,

J. N. FLOWERS

By James N. Ogden,

Counsel.

January, 1946.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is presented in good faith and not for delay.

JAMES N. OGDEN,

Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 143.—October Term, 1945.

Commissioner of Internal Revenue, Petitioner, *vs.* J. N. Flowers.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

This case presents a problem as to the meaning and application of the provision of § 23(a)(1)(A) of the Internal Revenue Code[1] allowing a deduction for income tax purposes of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

The taxpayer, a lawyer, has resided with his family in Jackson, Mississippi, since 1903. There he has paid taxes, voted, schooled his children and established social and religious connections. He built a house in Jackson nearly thirty years ago and at all times has maintained it for himself and his family. He has been connected with several law firms in Jackson, one of which he formed and which has borne his name since 1922.

In 1906 the taxpayer began to represent the predecessor of the Gulf, Mobile & Ohio Railroad, his present employer. He acted as trial counsel for the railroad throughout Mississippi. From 1918 until 1927 he acted as special counsel for the railroad in Mississippi. He was elected general solicitor in 1927 and continued to be elected to that position each year until 1930, when he was elected

[1] 26 U. S. C. § 23(a)(1)(A), as amended, 56 Stat. 819.

"§ 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

"(a) *Expenses.*—

"(1) *Trade or Business Expenses.*—

"(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad.

The main office of the Gulf, Mobile & Ohio Railroad is in Mobile, Alabama, as was also the main office of its predecessor. When offered the position of general solicitor in 1927, the taxpayer was unwilling to accept it if it required him to move from Jackson to Mobile. He had established himself in Jackson both professionally and personally and was not desirous of moving away. As a result, an arrangement was made between him and the railroad whereby he could accept the position and continue to reside in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both places. This arrangement permitted the taxpayer to determine for himself the amount of time he would spend in each of the two cities and was in effect during 1939 and 1940, the taxable years in question.

The railroad company provided an office for the taxpayer in Mobile but not in Jackson. When he worked in Jackson his law firm provided him with office space, although he no longer participated in the firm's business or shared in its profits. He used his own office furniture and fixtures at this office. The railroad, however, furnished telephone service and a typewriter and desk for his secretary. It also paid the secretary's expenses while in Jackson. Most of the legal business of the railroad was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad. The taxpayer's participation was advisory only and was no different from his participation in the railroad's legal business in other areas.

The taxpayer's principal post of business was at the main office in Mobile. However, during the taxable years of 1939 and 1940, he devoted nearly all of his time to matters relating to the merger of the railroads. Since it was left to him where he would do his work, he spent most of his time in Jackson during this period. In connection with the merger, one of the companies was involved in certain litigation in the federal court in Jackson and the taxpayer participated in that litigation.

During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two cities. During 1940 he spent 168

days in Jackson and 102 in Mobile, making 40 trips between the two cities. The railroad paid all of his traveling expenses when he went on business trips to points other than Jackson or Mobile. But it paid none of his expenses in traveling between these two points or while he was at either of them.

The taxpayer deducted $900 in his 1939 income tax return and $1,620 in his 1940 return as traveling expenses incurred in making trips from Jackson to Mobile and as expenditures for meals and hotel accommodations while in Mobile.[2] The Commissioner disallowed the deductions, which action was sustained by the Tax Court. But the Fifth Circuit Court of Appeals reversed the Tax Court's judgment, 148 F. 2d 163, and we granted certiorari because of a conflict between the decision below and that reached by the Fourth Circuit Court of Appeals in *Barnhill* v. *Commissioner*, 148 F. 2d 913.

The portion of § 23(a)(1)(A) authorizing the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" is one of the specific examples given by Congress in that section of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." It is to be contrasted with the provision of § 24(a)(1) of the Internal Revenue Code disallowing any deductions for "personal, living, or family expenses." And it is to be read in light of the interpretation given it by Sec. 19.23(a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code. This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts,[3] is deemed to possess implied legislative approval and to have the effect of law. *Helvering* v. *Winmill*, 305 U. S. 79; *Boehm* v. *Commissioner*, 326 U. S. —. In pertinent part, this interpretation states that "Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging.

[2] No claim for deduction was made by the taxpayer for the amounts spent in traveling from Mobile to Jackson. He also took trips during the taxable years to Washington, New York, New Orleans, Baton Rouge, Memphis and Jackson (Tenn.), which were apparently in the nature of business trips for which the taxpayer presumably was reimbursed by the railroad. No claim was made in regard to them.

[3] Article 23(a)-2 of Regulations 101, 94, 86; Article 122 of Regulations 77 and 74; Article 102 of Regulations 69 and 65; Article 101(a) of Regulations 62.

If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses. . . . Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. . . . Commuters' fares are not considered as business expenses and are not deductible."

Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23(a)(1)(A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. See *Commissioner* v. *Heininger*, 320 U. S. 467, 475. And the Tax Court's inferences and conclusions on such a factual matter, under established principles, should not be disturbed by an appellate court. *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Dobson* v. *Commissioner*, 320 U. S. 489.

In this instance, the Tax Court without detailed elaboration concluded that "The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It accordingly disallowed the deductions on the ground that they represent living and personal expenses rather than traveling expenses incurred while away from home in the pursuit of business. The court below accepted the Tax Court's findings of fact but reversed its judgment on the basis that it had improperly construed the word "home" as used in the second condition precedent to a traveling expense deduction under § 23(a)(1)(A). The Tax Court, it was said, erroneously con-

strued the word to mean the post, station or place of business where the taxpayer was employed—in this instance, Mobile—and thus erred in concluding that the expenditures in issue were not incurred "while away from home." The Court below felt that the word was to be given no such "unusual" or "extraordinary" meaning in this statute, that it simply meant, "that place where one in fact resides" or "the principal place of abode of one who has the intention to live there permanently." 148 F. 2d at 164. Since the taxpayer here admittedly had his home, as thus defined, in Jackson and since the expenses were incurred while he was away from Jackson, the deduction was permissible.

The meaning of the word "home" in § 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Mertens, Law of Federal Income Taxation (1942) § 25.82. The Tax Court[1] and the administrative rulings[2] have consistently defined it as the equivalent of the taxpayer's place of business. See *Barnhill* v. *Commissioner*, *supra* (C. C. A. 4). On the other hand, the decision below and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C. C. A. 9), have flatly rejected that view and have confined the term to the taxpayer's actual residence. See also *Cebuan* v. *Commissioner*, 138 F. 2d 763 (C. C. A. 2).

We deem it unnecessary here to enter into or to decide this conflict. The Tax Court's opinion, as we read it, was grounded neither solely nor primarily upon that agency's conception of the word "home." Its discussion was directed mainly toward the relation of the expenditures to the railroad's business, a relationship required by the third condition of the deduction. Thus even if the

[1] Bixler v. Commissioner, 5 B. T. A. 1181; Griesemer v. Commissioner, 10 B. T. A. 380; Brown v. Commissioner, 13 B. T. A. 832; Duncan v. Commissioner, 17 B. T. A. 1088; Peters v. Commissioner, 19 B. T. A. 901; Lindsay v. Commissioner, 34 B. T. A. 840; Powell v. Commissioner, 34 B. T. A. 655; Tracy v. Commissioner, 39 B. T. A. 578; Priddy v. Commissioner, 43 B. T. A. 18; Schurer v. Commissioner, 3 T. C. 544; Gustafson v. Commissioner, 3 T. C. 998.

[2] Section 19.23(a)-2 of Treasury Regulations 103 does not attempt to define the word "home" although the Commissioner argues that the statement therein contained to the effect that "commuters' fares are not business expenses and are not deductible" necessarily rests on the premise that 'home' for tax purposes is at the locality of the taxpayer's business headquarters." Other administrative rulings have been more explicit in treating the statutory home as the abode at the taxpayer's regular post of duty. See, e. g., O. D. 1021, 5 Cum. Bull. 174 (1921); I. T. 1264, I-1 Cum. Bull. 122 (1922); I. T. 3314, 1939-2 Cum. Bull. 152; G. C. M. 23672, 1943 Cum. Bull. 66.

Tax Court's definition of the word "home" was implicit in its decision and even if that definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad's business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction.

Turning our attention to the third condition, this case is disposed of quickly. There is no claim that the Tax Court misconstrued this condition or used improper standards in applying it. And it is readily apparent from the facts that its inferences were supported by evidence and that its conclusion that the expenditures in issue were non-deductible living and personal expenses was fully justified.

The facts demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad. Jackson was his regular home. Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the necessary direct relation to the prosecution of the business. The character of such expenses is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the costs of transportation, food and lodging. Whether he maintained one abode or two, whether he traveled three blocks or three hundred miles to work, the nature of these expenditures remained the same.

The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were the personal and living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad's legal business. The railroad did not require him to travel on business from Jackson to Mobile or to maintain living quarters in both cities. Nor did it compel him, save in one instance, to perform tasks for it in Jackson. It simply asked him to be at his principal post in Mobile as business demanded and as his personal convenience was served, allowing him to divide his business time between Mobile and Jackson as he saw fit. Except for the federal court litigation, all of the taxpayer's work in Jackson would normally have been performed in the headquarters at Mobile. The fact that he traveled frequently between

the two cities and incurred extra living expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer.

Travel expenses in pursuit of business within the meaning of § 23 (a) (1) (A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here.

It follows that the court below erred in reversing the judgment of the Tax Court.

Reversed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 145.—October Term, 1945.

Commissioner of Internal Revenue, Petitioner, vs. J. N. Flowers.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1946.]

Mr. Justice Rutledge, dissenting.

I think the judgment of the Court of Appeals should be affirmed. When Congress used the word "home" in § 23 of the Code, I do not believe it meant "business headquarters." And in my opinion this case presents no other question.

Congress allowed the deduction for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business." Treasury Regulations 103, § 19.23(a)-1, are to the same effect, with the word "solely" added after "home." Section 19.23(a)-2 also provides: "Commuters' fares are not considered as business expenses and are not deductible." By this decision, the latter regulation is allowed, in effect, to swallow up the deduction for many situations where the regulation has no fit application.

Respondent's home was in Jackson, Mississippi, in every sense, unless for applying § 23. There he maintained his family, with his personal, political and religious connections; schooled his children; paid taxes, voted, and resided over many years. There too he kept hold upon his place as a lawyer, though not substantially active in practice otherwise than to perform his work as general counsel for the railroad. This required his presence in Mobile, Alabama, for roughly a third of his time. The remainder he spent in Jackson at the same work, except for the time he was required to travel to points other than Mobile.

The company's principal offices were there, including one set aside for respondent's use. But the bulk of its trackage was in Mississippi and much of its legal work, with which he was concerned, was done there. His choice to keep his home in Jackson must have been affected by this fact, although it was motivated

chiefly by more purely personal considerations. It is doubtful indeed; though perhaps not material, whether by not moving to Mobile he did not save the Government from larger deductions on account of traveling expense than those he claimed.

There is no question therefore but that respondent's home was in Jackson for every purpose unless for the single one of applying § 23. Nor is it in doubt that he traveled from Jackson to Mobile and return, as he claimed, or that he spent the sums deducted for that purpose, including meals and lodging. Neither is it denied, as matter of fact, that his sole reason for going to Mobile was to perform his work as it required his presence there or that he returned to his home in Jackson periodically when his duties no longer required him to be in Mobile.

I think this makes a case squarely within the statute and the regulations. But the Tax Court ruled that the claimed deductions were, "personal, living, or family expenses." Because the taxpayer elected to keep his home in Jackson, rather than move to Mobile, and because his employer did not undertake to pay these expenses, it viewed the case as being the same as if he had moved to Mobile. In that event, it said, he would have been required to bear the expenses of his own meals and lodging. This is obvious, even though the "as if" conclusion does not follow. The court went on, however, to give the further reason for it: "The situation . . . is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It seems questionable whether, in so ruling, the Tax Court has not confused the taxpayer's principal place of employment with his employer's. For on the facts Jackson rather than Mobile would seem more appropriately to be found *his* business headquarters. But, regardless of that, the authorities cited[1] and the Government's supporting

[1] Frank H. Sullivan, 1 B. T. A. 93; Mort L. Bixler, 5 B. T. A. 1181; Jennie A. Peters, 19 B. T. A. 901; Walter M. Priddy, 43 B. T. A. 18.

The *Sullivan* case illustrates the typical commuter situation. The *Peters* case illustrates the extension of that ruling to greater distances and irregular travel.

Recent decisions, however, where the traveling distance is great, appear to go on the theory, presented in the instant case, that the word "home" within the meaning of § 23(a)(1) means "principal place of business." See Tax Court Memorandum Opinion, Dec. 13,853(M), 1 C. C. H. Tax Serv. 1945, p. 1268. Thus, Mertens says that the disallowance of traveling expenses to one's place of business "is based primarily on the requirement that the traveling expenses include only amounts expended 'while away from home.'" 4 Mertens, Law of Federal Income Taxation, 478.

argument show that the case was regarded as in essence the commuter's, excepted by the regulations.

Apart from this ruling, the Tax Court made no finding, of fact or law, that respondent was not engaged "in the pursuit of a trade or business"; that he was not "away from home"; that the expenses were not "business expenses" or "business traveling expenses"; or that they were not "ordinary and necessary." Yet by a merry-go-round argument,[2] which always comes back to rest on the idea that "home" means "business headquarters," the Government seeks to inject such issues and findings, including a *Dobson* (320 U. S. 489) contention, into the Tax Court's determination. I think there was only one issue, a question of law requiring construction of the statute as to the meaning of the word "home" and, if that is resolved against the Government, the Tax Court's judgment has no other foundation on which to stand. Every other contention falls when this one does. All stand if it is valid.

I agree with the Court of Appeals that if Congress had meant "business headquarters," and not "home," it would have said "business headquarters." When it used "home" instead, I think it meant home in everyday parlance, not in some twisted special meaning of "tax home" or "tax headquarters."[3] I find no purpose stated or implied in the Act, the regulations or the legislative history to support such a distortion or to use § 23 as a lever to force people to move their homes to the locality where their employer's chief business headquarters may be, although their own work may be done as well in major part at home. The only stated purpose, and it is clearly stated, not in words of art, is to relieve the tax burden when one is away from home on business.

The Government relies on administrative construction, by the

[2] Thus the assertion that the deductions were "not even 'business' expenses," is brought back to the meaning of "home" by the given reason that "'the maintenance of more than one dwelling place manifestly is not essential to the prosecution of a business.'" And this, in turn, completes the circle by resting on the conclusion that the taxpayer had two dwelling places, one in Mobile (presumably the hotel or hotels where he stopped) "where he resided during the periods the living expenses in question were incurred," the other in Jackson "where he resided during other periods." Likewise, the conclusion that the deductions were not "ordinary and necessary expenses," see note 8, depends on the view that Jackson was not "home" but Mobile was. So with the assertion that the "Mobile living expenses" were not "business traveling expenses."

[3] Cf. Cox v. Lott, 12 Wall. 204; Addison v. Holly Hill Co., 322 U. S. 607, 617, 618.

Commissioner and the Tax Court, and says that unless this is accepted the Act creates tax inequality. If so, it is inequality created by Congress, and it is not for the Commissioner or the Tax Court, by administrative reconstruction, to rewrite what Congress has written or to correct its views of equality. Moreover, in my opinion, the inequity, if any, comes not from the statute or the regulation but from the construction which identifies petitioner with a commuter.

That word too has limitations unless it also is made a tool for rewriting the Act. The ordinary, usual connotation, cf. 21 I. C. C. 428; *Pennsylvania R. Co.* v. *Towers*, 245 U. S. 6, 12, does not include irregular, although frequent journeys of 350 miles, requiring Pullman accommodations and some twelve to fifteen hours, one way.

Congress gave the deduction for traveling away from home on business. The commuter's case, rightly confined, does not fall in this class. One who lives in an adjacent suburb or city and by usual modes of commutation can work within a distance permitting the daily journey and return, with time for the day's work and a period at home, clearly can be excluded from the deduction on the basis of the section's terms equally with its obvious purpose. But that is not true if "commuter" is to swallow up the deduction by the same sort of construction which makes "home" mean "business headquarters" of one's employer. If the line may be extended somewhat to cover doubtful cases, it need not be lengthened to infinity or to cover cases as far removed from the prevailing connotation of commuter as this one. Including it pushes "commuting" too far, even for these times of rapid transit.[4]

Administrative construction should have some bounds. It exceeds what are legitimate when it reconstructs the statute to nullify or contradict the plain meaning of nontechnical terms not artfully employed. Moreover, in this case the matter has been held in suspension by litigation with varying results[5] and apparent quali-

[4] Conceivably men soon may live in Florida or California and fly daily to work in New York and back. Possibly they will be regarded as commuters when that day comes. But, if so, that is not this case and, in any event, neither situation was comprehended by Congress when § 23 was enacted.

[5] See Wallace *v.* Commissioner, 144 F. 2d 407 (C. C. A. 9); Coburn *v.* Commissioner, 138 F. 2d 783 (C. C. A. 2); and the decision now in review, 148 F. 2d 168 (C. C. A. 5), with which compare Barnhill *v.* Commissioner and Winborne *v.* Commissioner, 148 F. 2d 913 (C. C. A. 4).

fication by the Tax Court consequent upon some of the decisions.[6]

By construing "home" as "business headquarters"; by reading "temporarily" as "very temporarily" into § 23; by bringing down "ordinary and necessary" from its first sentence into its second;[7] by finding "inequity" where Congress has said none exists; by construing "commuter" to cover long-distance, irregular travel; and by conjuring from the "statutory setting" a meaning at odds with the plain wording of the clause, the Government nudges over understandable ordinary English into highly technical tax jargon. There is enough of this in the tax laws inescapably, without adding more in the absence of either compulsion or authority. The arm of the tax gatherer reaches far. In my judgment it should not go the length of this case. Congress has revised § 23 once to overcome niggardly construction.[8] It should not have to do so again.

[6] See Harry F. Schurer, 3 T. C. 554; Charles G. Gustafson, 3 T. C. 898; Mortimer M. Mahony, T. C. H. Tax Ct. Serv., Dec. 7,508(M), April 10, 1945; Charles J. McLennan, C. C. H. Tax Ct. Serv., Dec. 14,644(M), June 25, 1945; Robert S. Shelley, deceased, C. C. H. Tax Ct. Serv., Dec. 15,642(M), June 25, 1945.

[7] The language is: "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . . ." § 23(a)(1)(A), Internal Revenue Code.

[8] The Treasury Regulations in force in 1926 allowed deduction of only the excess of the cost of meals and lodging away from home over the cost at home; and under earlier regulations none of this expense was allowed. Congress inserted the words "all" and "entire" in the 1921 Act to overcome this ruling.